Supreme Court, U.S.
FILED
NOV 29 1991
OFFICE OF THE CLERK

(1)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. ~~91-942~~

KENNETH RICHARDSON
and
NORMAN J. TRAPP,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

CRITCHLOW, WILLIAMS, SCHUSTER, MALONE & SKALBANIA
Attorneys for Petitioner
Kenneth Richardson

David E. Williams

1177 Jadwin Ave.
P.O. Box 1487
Richland, WA 99352
(509) 946-6181

LONGFELDER, TINKER, KIDMAN & FLORA INC. P.S.
Attorneys for Petitioner
Norman J. Trapp

Gregg L. Tinker

101 Stewart St.
Suite 1010
Seattle, WA 98101
(206) 447-9640

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. _____

KENNETH RICHARDSON
and
NORMAN J. TRAPP,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

CRITCHLOW, WILLIAMS, SCHUSTER, MALONE & SKALBANIA
Attorneys for Petitioner
Kenneth Richardson

David E. Williams

1177 Jadwin Ave.
P.O. Box 1487
Richland, WA 99352
(509) 946-6181

LONGFELDER, TINKER, KIDMAN & FLORA INC. P.S.
Attorneys for Petitioner
Norman J. Trapp

Gregg L. Tinker

101 Stewart St.
Suite 1010
Seattle, WA 98101
(206) 447-9640

THIS PAGE LEFT BLANK INTENTIONALLY.

ISSUES PRESENTED FOR REVIEW

1. Did the lower courts err in concluding that the United States government could, after some thirteen years of litigation, assert the "discretionary function exception" to tort liability under 28 U.S.C. Sec. 1346(b), 2680(a)? 2. Did the trial court err in concluding that the failure of the United States government to install protective overhead ground wires was a design decision within the statutory discretionary function exception? 3. Did the trial court err in the manner in which it applied the standard of care dictated in Richardson v. United States, 841 F.2d 993 (9th Cir., 1988)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed accurately in the caption of the case.

TABLE OF CONTENTS

	Page
Issues Presented For Review	1
Parties To Proceeding	1
Table Of Contents	2
Table of Authorities	2
Statement of Jurisdiction	3
Statement Of The Case	4
Argument	10
Conclusion	28

TABLE OF AUTHORITIES

	Page
Brashear v. Puget Sound PL 100 Wn.2d 204, 667 P.2d 78 (1983)	23
Keegan v. Grant Co. PUD 34 Wn.App. 274, 661 P.2d 146 (1983)	6,21,22 23,25,26 27,28
Mitchell v. United States 787 F.2d 466 (CA9, 1986) cert. denied 108 S.Ct. 163 (1987)	10
Miller v. United States 587 F.2d 991 (CA9, 1978)	21
Richardson v. United States	1,5

645 F.2d 731 6,10
(CA9, 1981) 12,13

Richardson v. United States 6,14
841 F.2d 993 21,28
(CA9, 1988) 29

Rikstad v. Holmberg 24
76 Wn.2d 265,
456 P.2d 355 (1969)

Scott v. PPL Co. 23
178 Wash. 647
35 P.2d 749 (1934)

Stewart v. United States 15,16
199 F.2d 517 (CA7, 1952)
cert. denied
71 S.Ct. 1000

Summers v. United States 18,19
9095 F.2d 1212 20
(CA9, 1990)
28 U.S.C. §1291 3
28 U.S.C. §1346(b) 1,3,15,16
28 U.S.C. §2671 et seq. 3
28 U.S.C. §2680(a) 1,16
29 CJS, Electricity §39,
at 1064-66 (1965) 24

REFERENCE TO REPORTS/SEE APPENDIX

STATEMENT OF JURISDICTION

The United States District Court had subject matter jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §2671 et seq., and 28 U.S.C. §1346(b).

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291 from a final

decision of the United States District Court for the Eastern District of Washington. The Memorandum Decision of February 10, 1986, the Supplemental Memorandum Decision of June 11, 1986, the Memorandum and Order of January 12, 1989, the Memorandum Opinion of February 15, 1990, the Judgment of February 15, 1990, and the Order Denying Motion for Reconsideration of May 4, 1990 of the District Court, finally disposed of all claims with respect to all parties. The judgment is appealable.

The Court of Appeals rendered its decision on August 30, 1991. This Petition for Certiorari is therefore timely.

STATEMENT OF THE CASE

This is an action for damages based on personal injuries. On May 10, 1975, the plaintiffs Richardson and Trapp were in the process of moving metal irrigation pipes, one 40' long, across a pasture

located in the eastern part of Washington State.

Crossing the pasture was a high power line designed, constructed and maintained by an agency of the defendant-appellee, BPA.

Plaintiffs Richardson and Trapp carried the irrigation pipes under the energized conductors between the structures, where the line was approximately 30 feet above the ground. While in the process of doing so, the men were injured by electrical current from the power line.

Both Richardson and Trapp suffered severe personal injuries. This lawsuit ensued.

From an initial adverse judgment in the district court Richardson appealed, and the Ninth Circuit Court of Appeals reversed and remanded for a new trial on the basis that the trial judge applied the wrong standard of care. Richardson

v. United States, 645 F.2d 731 (CA9, 1981) ("Richardson I").

Following remand, the Richardson and Trapp cases were consolidated and the liability issue was tried before Judge McNichols in March, 1983, who found BPA liable to the plaintiffs.

BPA appealed. The Court of Appeals, in Richardson v. United States, 841 F.2d 993 (CA9, 1988) ("Richardson II"), reversed and remanded the cases for trial, holding that the trial court should evaluate the defendant's conduct considering a footnote in Keegan v. Grant County P.U.D., 34 Wn.App. 274, 661 P.2d 146 (1983), a decision from an intermediate state appellate court.

Following Richardson II, the Circuit Court entered an Order Modifying Opinion which remanded the case for a new trial "on the issue of liability and application of the Keegan standard. We leave to

the sound discretion of the experienced trial judge the decision whether under all the circumstances there should be a full trial on other issues."

Judge McNichols entered a Memorandum and Order on January 12, 1989, regarding the scope of the scheduled evidentiary hearing. The order effectively left intact the court's findings from the second trial:

> 1. The plaintiffs' injuries were caused when lightning struck the conductor and in some manner diverted the energy to the pipe which the plaintiffs were carrying.
>
> 2. Lightning storms are not uncommon in the area.
>
> 3. There was a "front" in the area of the accident at the time in question.
>
> 4. There was a burn mark on the conductor which could have been caused either by contact with the pipe or by lightning diverting the energy in the line down to the point where it struck the pipe. I have concluded under all the circumstances that the conductor was not contacted by the pipe nor was the end of the pipe in close proximity to

the conductor.

5. Had the power line been equipped with an overhead ground system a lightning strike would have been diverted and grounded and the injuries would not have occurred.

6. There were no visible warning signs to remind the public of the existence of the lines or of any danger in being in proximity to them during an electrical storm.

7. The government was aware that people routinely worked beneath the conductors moving irrigation pipe from one place to another.

8. The danger from the conductors in question is clearly lethal. Therefore, even under Keegan, practical operation becomes "minimally relevant".

9. The phenomenon of "mid-point flash carryover" was known to the government but was an unusual occurrence.

10. If the accident had occurred as the government contends it did, foreseeability would be greater than was the foreseeability of the mid-point flash carryover.

Following the third liability trial, the trial court that the decision by BPA whether to install overhead ground wires is a design decision within the discre-

tionary function exception, that the discretionary function exception goes to subject matter jurisdiction and can be raised at any time, and ordered that these consolidated actions be dismissed. This was done on February 15, 1990.

Following further argument, the court entered an Order Denying Motion for Reconsideration on May 4, 1990, finding that if Mr. Richardson was entitled to damages, it was in the sum of $1,093,094, but went on to conclude:

> "1. That there was no actionable negligence on the part of the defendant under the rule of Keegan.
>
> 2. If in fact the defendant was negligent, and, if that negligence was the proximate cause of the plaintiff's injuries, the plaintiff's claim is foreclosed by the discretionary function exception as provided in the Memorandum and Order of February 15, 1990."

Plaintiffs appealed. The Ninth Circuit, in a decision issued August 30, 1991, upheld the trial judge's determina-

tion that the discretionary function exception was applicable and directed dismissal of plaintiffs' claims.

ARGUMENT

A. THE UNITED STATES, HAVING EXTENSIVELY LITIGATED THESE CASES OVER A PERIOD OF 14 YEARS, SHOULD NO LONGER BE PERMITTED TO AVAIL ITSELF OF THE DISCRETIONARY FUNCTION EXCEPTION.

1. Standard of Review. Appellate review of a district court determination of subject matter jurisdiction under the discretionary function exception is de novo. Mitchell v. United States, 787 F.2d 466, 468 (9th Cir., 1986), cert. denied, 108 S.Ct. 163 (1987).

2. Summary of the Behavior of the United States Indicative of Waiver of the Discretionary Function Exception and Stipulation to and Assertion of Subject Matter Jurisdiction. On June 13, 1978, prior to the first trial in Richardson v. United States, the judge entered a pre-trial conference order. The parties stipulated and the court ordered:

> This is an action for personal

> injuries asserted against the defendant by the plaintiff under the provisions of 28 U.S.C. 2671, et seq.
>
> This court has jurisdiction over the parties to and subject matter of this action under the terms of 28 U.S.C. 1346(b).

The liability trial of Richardson was in 1978. The United States had pled the defense of the lack of subject matter jurisdiction. In its pre-trial memorandum it argued application of the discretionary function exception. The district court entered its Findings of Fact and Conclusions of Law on July 17, 1979. Although none of such Findings and Conclusions specifically addressed the discretionary function defense, the district judge ruled adversely to the government on jurisdiction:

> 1. This court has jurisdiction over the parties and over the subject matter of this action under 28 U.S.C. §1346(b).

Richardson appealed from that judg-

ment. The government had the chance and the obligation to go to the Court of Appeals on the issue of the discretionary function defense. It failed to do so. See Richardson I.

When Richardson v. United States was tried in Spokane before Judge Neill, Trapp v. United States had been filed in the United States District Court, Western District of Washington. In September of 1979, the United States moved for summary judgment against Trapp. The government had pled lack of subject matter jurisdiction. However, its motion for summary judgment or dismissal raised only the issue of collateral estoppel, arguing that the district court judgment in Richardson v. United States collaterally estopped Trapp from litigating the same issues against the government. Judge Donald Voorhees denied the motion on October 2, 1979, and entered a stay of

proceedings pending the decision of Richardson v. United States in the Ninth Circuit Court of Appeals. On February 19, 1982, Judge Voorhees entered an order transferring the venue of Trapp v. United States to the United States District Court for the Eastern District of Washington. On June 28, 1982, an order for consolidation was entered.

In the interim between the Ninth Circuit's decision in Richardson I and the second liability trial of these cases before Judge McNichols in March of 1983, the government failed to pursue the discretionary function defense. Over a year transpired from the time of the liability trial and the damage trial before Judge McNichols in the fall of 1984. The government's silence about such defense continued.

On February 10, 1986, Judge McNichols entered his memorandum decision setting

forth Findings of Fact, Conclusions of Law, and calculation of damages. Although the Findings and Conclusions in that decision do not mention the discretionary function defense, the judgment for the plaintiffs inherently establishes a determination in favor of jurisdiction.

The government continued to invoke the jurisdiction of the federal courts by appealing Judge McNichols' memorandum decision and judgments in favor of the plaintiffs Trapp and Richardson. It failed to pursue the defense in such appeal to the Ninth Circuit. See Richardson II.

3. The Defendant United States of America Has, Throughout the Lengthy History of These Proceedings, Availed Itself of the Jurisdiction of the Federal Court Without Challenging the Jurisdictional Power of the Federal Court System to Adjudicate the Plaintiffs' Claims.

During the many years that these cases have been in litigation, there were num-

erous status and pre-trial conferences, motions, three liability trials, one damage trial, and two appeals to the Ninth Circuit Court of Appeals. Before the last trial, the government had asserted the discretionary function defense, repeatedly lost on the issue, but failed to pursue it at the trial or appellate level.

Insofar as appellants have discovered, there is only one case which has a history similar to the case at bar (Stewart v. United States, 199 F.2d 517 (7th Cir., 1952), cert. denied, 71 S.Ct. 1000). The opinion of the Seventh Circuit Court of Appeals in Stewart is an eminently just and sound one. Appellants urge that the rationale thereof be adopted here.

In Stewart the government urged that the complaint filed on behalf of the minors "did not invoke the jurisdiction of the court under the terms of 28 U.S.C.

1346(b)" because of "the exceptions set forth in 28 U.S.C. 2680(a)." Stewart, at p. 518.

In analyzing its dispositive conclusion to the contrary, the Stewart court noted at pp. 519-520:

> In our view, Sec. 1346(b) conferred general jurisdiction of the subject matter of claims coming within its purview, and the exceptions referred to are available to the government as a defense only when aptly pleaded and proven. If this view be correct, we discern no reason why the government the same as any other party defendant should not be held to have waived the defense. . . .

Stewart recognized and commented upon the preposterous implications of the position urged by the government. The precise observation is applicable to the case at bar. (See Stewart, p. 520).

In the second trial, the district court did not specifically and affirmatively state that the court had subject matter jurisdiction. However, as noted

previously, the issue was raised by the government and the jurisdiction is inherent in the court's judgment on the merits.

Here, the government obviously concurred in the appropriateness of the trial judge's assumption of subject matter jurisdiction in both of the first two trials. Thus, it stated in its brief to the Ninth Circuit following the second trial that:

> B. Jurisdiction and Timeliness
>
> The United States District Court had subject matter jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §2671, et seq., and 28 U.S.C. §1346(b).

The Ninth Circuit Court of Appeals, on two occasions, has reviewed the proceedings in these cases and did not have the issue of subject matter jurisdiction before it or raise it sua sponte.

The phrase that the question of subject matter jurisdiction can be raised at

any time simply has no application to this case. The appellants can find no case that constitutes precedential authority for the proposition that the discretionary function exception can be litigated and relitigated in a single case at the federal district court level and still be preserved notwithstanding the government's failure twice to seek a ruling from the Court of Appeals.

B. ASSUMING, ARGUENDO, THE DISCRETIONARY FUNCTION EXCEPTION DEFENSE IS AVAILABLE TO THE GOVERNMENT, THE COURT ERRED IN ITS APPLICATION TO BAR THE PLAINTIFFS' CLAIMS

1. The Government's Failure to Provide Overhead Ground Wires to Protect Human Beings Involved No Concomitant Exercise of Judgment Grounded in Social, Economic or Political Policy. Under the facts of the cases at bar, even if the discretionary function exception is applicable, principles enunciated in cases such as Summers v. United States, 905 F.2d 1212 (9th Cir., 1990) make it clear that the actions of the BPA at issue here are not

shielded.

The undisturbed findings by Judge McNichols in this case include the fact that the plaintiffs' injuries were caused when lightning struck the conductor and diverted the energy to the pipe which the plaintiffs were carrying; had the power line been equipped with an overhead ground system a lightning strike would have been diverted and grounded and the injuries would not have occurred; the government was aware that people routinely worked beneath the conductors moving irrigation pipe from one place to another; and the phenomenon of mid-point flash carryover was known to the government, although it was unusual.

As noted by the Ninth Circuit in Summers, the courts utilize a two-step test to determine whether the FTCA discretionary function exception applies in a given case. (Summers, at 1214).

Under this two-step test, a failure by BPA to follow a provision of a federal regulation or policy to which it is subject would not be protected under the FTCA's discretionary function exception. There is no dispute that BPA's failure contravened a federal statute, regulation or policy. However, the second step of analysis announced by the Ninth Circuit Court of Appeals is a determination whether BPA's failure to provide overhead ground wires for the protection of people is grounded in social, economic or political policy. It is submitted that the analysis of Summers provides the compelling measure for concluding that it was not.

The essential facts in the instant case resemble closely those in Summers.

C. THE TRIAL COURT ERRED IN ITS APPLICATION OF THE STANDARD OF CARE

1. Standard of Review. Appellate

courts review de novo the standard of care and the test of proximate cause the trial court should have applied.

> Our review of what standard of conduct should have been utilized in a negligence finding is a legal question.

Miller v. United States, 587 F.2d 991, 994 (9th Cir., 1978).

2. The Trial Court Erred in Applying the Standard of Care for a Utility by Misinterpreting the Sliding Scale Analysis Mandated by Richardson II. The Ninth Circuit Court of Appeals, in Richardson II, remanded this case for a "new trial on the issue of liability and the application of the Keegan standard".

The District Court failed to follow this mandate to apply the "Keegan standard" to these cases.

In the Order Denying Motion for Reconsideration, the judge's narrative preceding his findings states:

> The rule in Keegan obviously embraces some element of foreseeability. Keegan would appear to re-

> quire management of utilities to evaluate the danger posed to the public and evaluate what can or should be done to minimize or alleviate that danger consistent with the practical operation. Obviously, if the danger is minimal and efforts to eliminate that danger would significantly impact the practical operation of the utility, the utility is empowered to exercise reasonable discretion.

The trial court's incorporation of foreseeability into the rule in Keegan and his differentiation between the energy in the line and the danger to which the public is exposed, focusing on "danger" vis-a-vis the voltage of the line, directed the court to a faulty analysis of the application of the Keegan rule.

A utility's standard of care to exercise the highest degree of care that human prudence is equal to is premised upon high voltage cases and not the frequency with which a foreseeable event may occur.

Erroneously, in its analysis, the trial court essentially ignored the lethal danger and gave total weight to foreseeability as it relates to frequency of occurrence.

The proper analysis is set forth in Scott v. Pacific Power & Light Co., 178 Wash. 647, 650, 35 P.2d 749 (1934) at p. 632.

The proposition that the "danger" alluded to in the Keegan sliding scale is based on voltage, not frequency of occurrence, is further emphasized in Brashear v. Puget Power & Light, 100 Wn.2d 204, 667 P.2d 78 (1983). In view of the standard of care placed on the utility, by Brashear and other cases, it is not the infrequency of injurious occurrence which defines the utility's duty, but whether the lethal event is foreseeable.

In Keegan, at p. 280, the Washington Court of Appeals cited with approval, 29

C.J.S. Electricity §39, at 1064-66 (1965), which states:

> In other words, the care required may properly be stated to be the highest degree of care which skill and foresight can obtain, consistent with the conduct of business under the known methods and present state of the particular art. Those engaged in the business of conducting electricity over high-voltage wires are bound to exercise greater precaution in its use than if the property were of a less dangerous character, and are, therefore, bound to anticipate more remote possibilities of danger.

A leading case on foreseeability is Rikstad v. Holmberg, 76 Wn.2d 265, 456 P.2d 355 (1969). See Rikstad, at 269:

> It is not, however, the unusualness of the act that resulted in injury to plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of the hazards covered by the duty imposed upon defendant.
>
> We approved this theory in McLeod v. Grant County School Dist., 42 Wn.2d 316, 255 P.2d 360 (1953), in which this court said:
>
> > Whether foreseeability is being considered from the standpoint of negligence or proximate

> cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.

The record herein established that before 1975 the Bonneville Power Administration was aware of the significant risk of harm or death to persons near power lines during electrical storms. A BPA publication issued in 1973, entitled "Tips on How to Behave Near High Voltage Lines", gave the following admonition: "During an electrical storm, stay away from lines and towers."

3. Under the Proper Keegan Standard of "Practical Operation", All the Evidence Established That it Was Practical to Install Overhead Ground Wires. A careful analysis of the factual and legal posture of these cases following the third liability trial shows clearly that the trial court found again-

st the plaintiffs on the issue of negligence, not because of considerations of practical operation, but rather complementary to his interpretation of the duty question and his faulty application of the Keegan "sliding scale".

Under Keegan, there are only two questions which may be considered by the court regarding "practical operation".

The first question is whether the utility has conducted its operations under the known safety methods and the present state of the art. Despite BPA's protestations throughout each of the three trials of these cases, the trial court found that the plaintiffs were injured from a mid-point flashover, a phenomenon that was known to BPA and therefore foreseeable, and that an overhead ground wire such as those used to protect equipment and facilities would have prevented the injuries to the plain-

tiffs. (See trial court's findings.)

It is clear that long before the injury to the plaintiffs when the subject transmission line was installed in 1957, overhead ground wires were being used by BPA on some components of its system but not on the instant section.

The second guideline from Keegan for addressing the issue of "practical operation" regards the economic impact of safety measures. As discussed previously, it is submitted that the trial court misapplied the standard of care analysis and sliding scale regarding "practical operation". As importantly, the trial court improperly weighed in cost, noting that "[i]t is beyond question that the installation of such wires would be an expensive proposition," and finding that "the cost of such installation compared with the remote risk would not be consistent with the practical operation of the

utility under the Keegan standard", despite the complete lack of any evidence as to what the cost would have been at installation in 1957 or at any time thereafter.

CONCLUSION

It is respectfully submitted that, under the material circumstances, the holding here ought to be that the United States is precluded from raising the affirmative defense of lack of subject matter jurisdiction under the discretionary function exception to the FTCA and, in any case, the failure of BPA to install overhead ground wires to protect people was not a decision grounded in social, political or economic policy.

It is also requested that this court hold that the trial court erred in application of the standard of care as pronounced in Richardson II. The record

before this court establishes that, if Richardson II is properly applied to the facts in this case, Richardson and Trapp are entitled to judgment against the United States.

The Judgment of the District Court should be reversed and the causes remanded for entry of judgment in favor of Richardson in the sum of $1,093,094 and Trapp in the sum of $849,891.

The "discretionary function" exception to the Tort Claims Act, as applied in recent decisions from some of the circuits, has greatly diminished a right of those injured by federal negligence to redress. The Supreme Court is hereby requested to restore a uniform measure of balance, for that category, among the

citizenry.

Respectfully submitted,

LONGFELDER, TINKER, KIDMAN
& FLORA, INC.

and

CRITCHLOW, WILLIAMS, SCHUSTER,
MALONE & SKALBANIA
Attorneys for Petitioners

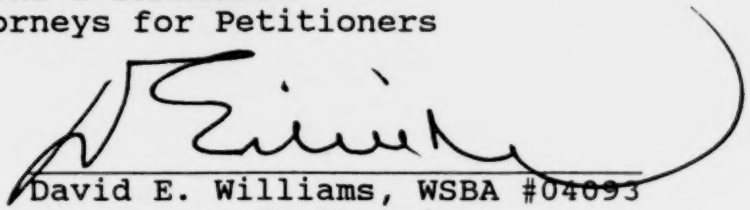
By: 
David E. Williams, WSBA #04093
Of Counsel To The Firms

TABLE OF CONTENTS TO APPENDIX

		Page
1.	Richardson/Trapp v. U.S. Decision of Court of Appeals, dated 8/30/91, to which instant petition applies.	A1-15
2.	Richardson/Trapp v. U.S. Order Denying Motion For Reconsideration from U. S. District Court, Eastern District of Washington, dated 5/4/90.	A16-24
3.	Richardson/Trapp v. U.S. Memorandum Opinion of said U. S. District Court, dated 2/15/90.	A25-46
4.	Richardson/Trapp v. U.S. Memorandum and Order of said U. S. District Court, dated 10/27/88	A47-51
5.	Richardson/Trapp v. U.S. Order Modifying Opinion from Ninth Circuit Court of Appeals, dated 11/2/88	A52-53
6.	Richardson/Trapp v. U.S. Opinion of Ninth Circuit Court of Appeals, dated 3/14/88	A54-81
7.	Richardson/Trapp v. U.S. Supplemental Memorandum Decision of said District Court, dated 6/10/86	A82-86
8.	Richardson/Trapp v. U.S. Memorandum Decision of said District Court,	

dated 2/10/86 A87-101

9. Richardson/Trapp v. U.S.
Order of said District
Court, dated 11/29/83 A102-
A104

10. Richardson/Trapp v. U.S.
Memorandum and Order of
said District Court,
dated 6/29/83 A105-
A111

11. Richardson v. U.S.
Opinion of said
Circuit Court,
dated 5/18/81 A112-
A129

12. Richardson v. U.S.
Findings of Fact and
Conclusions of Law by said
District Court,
dated 7/17/79 A130-
A136

13. 28 U.S.C. §1291 A137

14. 28 U.S.C. §1346 A138-
A142

15. 28 U.S.C. §2674 A143

16. 28 U.S.C. §2680 A144-
A147

A-1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH RICHARDSON; NORMAN J. TRAPP,
Plaintiffs-Appellants,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Nos. 90-35423 and 90-35424
D.C. No. CV-76-0260-RJM
OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Robert J. McNichols, Chief Judge, Presiding

Argued and Submitted
February 5, 1991—Seattle, Washington

Filed August 30, 1991

Before: Charles Wiggins, Melvin Brunetti and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Brunetti

SUMMARY

Governmental Torts/Jurisdiction

Affirming a district court judgment dismissing an action for lack of subject matter jurisdiction, the court of appeals held that the discretionary function exception applied to bar an action against the government for injuries caused when lightning simultaneously struck a power line owned and operated

BEST AVAILABLE COPY

by the Bonneville Power Administration and appellants who were carrying a metal pipe underneath the power line.

Appellants Kenneth Richardson and Norman J. Trapp were injured when lightning simultaneously struck a power line while they were carrying a metal irrigation pipe underneath the power line. They filed suit against the government under the Federal Tort Claims Act (FTCA) claiming that had the Bonneville Power Administration (BPA), an agent of the government, equipped the power line with an overhead ground system the lightning strike would have been diverted and grounded and their injuries would not have occurred. On a previous remand, but prior to ruling, a Washington state court decided a case that criticized *Richardson I* and set forth a different applicable standard of care. The district court in this case held that it was bound by the law of the case as set in *Richardson I* and rejected the Washington state court standard stated in *Keegan*. On a second remand, the district court determined that the discretionary function exception applied in this case because the decision whether to install overhead ground wires was obviously a design decision related to construction. The case was therefore dismissed for lack of subject matter jurisdiction.

[1] An action under the FTCA is not available against the government when the act or omission complained of is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government. [2] While the appellants in this case conceded that BPA's failure to provide overhead ground wires on its transmission lines did not contravene a prescriptive federal statute, regulation or policy, they argued that the decision not to do so was not grounded in social, economic, or political policy under the two-step *Berkovitz* test. [3] Appellants argued that BPA's failure to install overhead ground wires was based more on the rejection of known safety hazards. However, a review of the record supported BPA's argument that the relevant design decisions

BEST AVAIL

involved not merely engineering analysis but the balancing of many technical, economic, and even social considerations and should not be second-guessed. [4] Thus, the district court properly dismissed this case for lack of subject matter jurisdiction. Subject matter jurisdiction cannot be conferred upon the courts by the actions of the parties and principles of estoppel and waiver do not apply. [5] Where the discretionary function exception applies, the jurisdictional grant under the FTCA does not apply. [6] Although the court recognized that, in appellants' view, this was a harsh end to a lengthy case, it found no room to balance the policies of validity and finality. Therefore, the district court judgment was affirmed.

COUNSEL

David E. Williams, Critchlow, Williams & Schuster, Richland, Washington, for the plaintiff-appellant Richardson.

Gregg L. Tinker, Longfelder, Tinker, Kidman & Flora, Inc., P.S., Seattle, Washington, for the plaintiff-appellant Trapp.

Thomas O. Rice, Assistant United States Attorney, Spokane, Washington, for the defendant-appellee.

OPINION

BRUNETTI, Circuit Judge:

This case involves a suit against the United States under the Federal Tort Claims Act for injuries caused when lightning simultaneously struck a power line and the plaintiffs who were carrying a metal irrigation pipe underneath the power line.[1]

[1]"This phenomenon of electricity travelling through the air from a high-voltage power line to the ground is known as a 'midpoint flash carryover' or a 'midpoint flashover.' " *Richardson v. United States*, 841 F.2d 993, 995 n.1 (9th Cir. 1988).

ABLE COPY

In two prior appeals before this court we found the district court applied an incorrect standard of care to determine negligence and remanded for a new trial. *See Richardson v. United States*, 645 F.2d 731, 735 (9th Cir. 1981) ("*Richardson I*"); *Richardson v. United States*, 841 F.2d 993, 995 (9th Cir. 1988) ("*Richardson II*"). The previous appeals did not address the question of the applicability of the discretionary function exception to the Federal Tort Claims Act. After this court's second remand, the district court found the discretionary function exception applied and dismissed the case for lack of subject matter jurisdiction. We affirm.

I. *Facts and Proceedings Below.*

The relevant facts are not disputed. The following is taken from *Richardson II*:

> On May 10, 1975, plaintiffs Kenneth Richardson and Norman Trapp were moving aluminum irrigation pipes on the farm that Trapp was renting. Suspended above one part of the farm were three power transmission lines owned and operated by [Bonneville Power Administration ("BPA")]. At the point where the plaintiffs were working, the lines are 30 feet above the ground.
>
> At the time of the accident, plaintiffs were each carrying one end of a 40-foot length of pipe, and Trapp was dragging a 20-foot length of pipe behind him, resting the shorter pipe on the longer one. As they passed underneath the power lines, plaintiffs suddenly received a high-voltage charge of electricity. Both were knocked unconscious and suffered severe and permanent injuries.

841 F.2d at 995. After the second trial in this case, the district court made findings of fact including: "Had the power line been equipped with an overhead ground system a lightning

strike would have been diverted and grounded and the injuries would not have occurred." This fact is not disputed. The question of BPA's negligence thus narrowed to the question whether BPA had a duty to install overhead ground wires at the place where the accident occurred. This fact also shapes the issue regarding the discretionary function exception to liability: whether the decision not to install the overhead ground wires at the place where the accident occurred was a discretionary function of BPA.

The plaintiffs filed separate suits against the United States alleging that the injuries were caused by the negligence of BPA, an agent of the United States. Jurisdiction was based on the Federal Tort Claims Act. The government's answer included the claim that the district court lacked jurisdiction over the subject matter of the action. The district court, after a court trial, found the government was not liable for appellant Richardson's injuries and Richardson appealed to this court. This court reversed and remanded for a new trial on the ground that the trial court applied an incorrect standard of care in determining liability. *Richardson I*, 645 F.2d at 735.

Prior to Richardson's second trial, appellant Trapp's suit was consolidated with Richardson's. *Richardson II*, 841 F.2d at 995. The liability issue was then tried again, this time applying the standard of care set forth in *Richardson I*. Prior to ruling, however, a Washington state court decided a case which criticized *Richardson I* and set forth a different applicable standard of care. *See Keegan v. Grant County Pub. Util. Dist.*, 34 Wash. App. 274, 661 P.2d 146, 149-150 & n.2 (1983). The trial judge in the present case held that he was bound by the law of the case as set forth in *Richardson I* and rejected the standard stated in *Keegan*. This time the trial court found the government liable for the appellants injuries. The trial court also considered and rejected the government's claim that the discretionary function exception applied.[2]

[2]On this issue the court stated,

There are three recent Ninth Circuit decisions in which the court

This court reversed stating that the law of the case does not control when "there has been a dispositive intervening decision of an intermediate appellate state court." *Richardson II*, 841 F.2d at 996. The court recognized that the original trial was conducted according to the proper standard but declared that the original judgment could not be reinstated and that a new trial was necessary. *Id.* at 998 n.9.

On remand, the district court declined to relitigate the factual issues in the case.[3] An evidentiary hearing was held in which the government again argued that the appellants' claims were foreclosed by the discretionary function exception and evidence was heard regarding the government's potential liability under *Keegan* as dictated by *Richardson II*. The district court determined that the discretionary function exception applied in this case because "[t]he decision whether to install overhead ground wires is obviously a design decision, vis-a-vis, construction." The district court held that because the discretionary function applied, the court was without subject matter jurisdiction over the action and ordered the cases dismissed. The appellants' motion for reconsidera-

---

addresses this exception to Federal Tort Claims Act liability. *Mitchell v. United States*, 787 F.2d 466 (9th Cir. 1986); *Henderson v. United States*, 784 F.2d 942 (9th Cir. 1986); and *Begay v. United States*, 758 F.2d 1059 (9th Cir. 1985). Unless I am missing something, these cases seem to create direct conflict on this issue. Assuming that I am correct, I am satisfied that we have not heard the last word on this issue.

After the judge made these remarks the Supreme Court decided *Berkovitz v. United States*, 486 U.S. 531 (1988), and the Ninth Circuit decided *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018 (9th Cir. 1989), and *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990). These cases are discussed in the text below.

[3]*Richardson II* was amended to state: "We leave to the sound discretion of the experienced trial judge the decision whether under all the circumstances there should be a full trial on other issues." *Richardson v. United States*, 860 F.2d 357 (9th Cir. 1988), amending 841 F.2d 993 (9th Cir. 1988).

tion was denied on May 4, 1990. An appeal was timely filed on May 21, 1990.

II. *Analysis.*

A. *The Discretionary Function Exception.*

[1] We review the trial court's determination of subject matter jurisdiction under the discretionary function exception de novo. *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1021 (9th Cir. 1989). The Federal Tort Claims Act authorizes suits against the United States for damages for personal injuries in situations where a private person would be liable under the law where the act or omission causing the injuries occurred. 28 U.S.C. §§ 1346(b), 2674. Such a suit is not available, however, when the act or omission complained of is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." 28 U.S.C. § 2680(a).

In *Kennewick*, the Kennewick Irrigation District brought suit against the United States for damages arising out of two breaks in Kennewick's main irrigation canal. 880 F.2d at 1019. The breaks were caused by a phenomenon called "piping" whereby water erodes the sides of the canal "causing a gradually increasing channel and eventually a break in the canal." *Id.* at 1020. The canal was designed by the United States Bureau of Reclamation. A United States Magistrate found the Bureau's failure to line the canal with concrete and take other preventative measures in the design of the canal fell outside the discretionary function exception. *Id.* at 1021. This court affirmed in part, and vacated and remanded in part.

The *Kennewick* court reviewed the history of Supreme Court discretionary function decisions including the Court's latest pronouncement in *Berkovitz v. United States*, 486 U.S. 531 (1988). *Berkovitz*, this court stated,

> directs us to apply a two-step test for determining whether the discretionary function exception applies. We must "first consider whether the action is a matter of choice for the acting employee. . . . [T]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz*, 108 S. Ct. at 1958. If the challenged conduct does involve an element of judgment, our second step is to "determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* at 1959. To be shielded, the judgment must be " 'grounded in social, economic, and political policy.' " *Id.*, *quoting [United States v. S.A. Empresa de Viacao Aerea Rio Granndense (Varig Airlines)]*, 467 U.S. [797,] 814, 104 S. Ct. [2755,] 2765.

Kennewick, 880 F.2d at 1025.

The court analyzed the Bureau of Reclamation's design decision under the two step *Berkovitz* test and found first that the decision did not contravene a prescriptive federal statute, regulation or policy. *Id.* at 1027. The court then discussed whether the decision was grounded in social, economic, or political policy. The court held that the Bureau of Reclamation's design decision not to line the canal was within the discretionary function exception because it " 'involve[d] not merely engineering analysis but judgment as to the balancing of many technical,' economic, 'and even social considerations.' " *Id.* at 1029 (quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 511 (1988)). Engineering decisions which involve the application of objective scientific standards without the consideration of economic, political, and social factors, however, fall outside the discretionary function exception. *Id.* at 1030. Also, though the government's decision must have been made in light of the consideration of social, economic, or political policy judgments before

the exception will apply, the government need not prove it considered these factors. The discretionary function exception may apply "in the absence of a conscious decision." *Id.* at 1028 (internal quotations omitted).

[2] The appellants in the present case concede that BPA's failure to provide overhead ground wires on its transmission lines did not contravene a prescriptive federal statute, regulation or policy. They argue, however, that the decision is not grounded in social, economic, or political policy and thus does not survive the second step of *Berkovitz*. Appellants argue that the proper authority for resolution of this issue is not *Kennewick*, but rather *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990).

Summers involved the failure of the Golden Gate National Recreation Area ("GGNRA") to warn of the dangers of stepping on hot coals in fire rings. The GGNRA is operated by the National Park Service. The Park Service has a sign policy that "limits park signs to the minimum number and size necessary for adequate warning and guidance to the public in order to conserve the scenery of the parks for future visitors." *Id.* at 1215. This court found the failure to provide a warning sign was not within the discretionary function exception. The court reasoned,

> a governmental failure to warn is not necessarily shielded from suit simply because a discretionary function is in some way involved. On the contrary, we have concluded that "where the challenged governmental activity involves safety considerations under an established policy, rather than the balancing of competing policy considerations, the rationale for the exception falls away and the U.S. will be responsible for the negligence of its employees." *ARA Leisure Services v. United States*, 831 F.2d 193, 195 (9th Cir. 1987) (quoting *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986)).

Id. at 1215. The court emphasized that the failure to warn involved safety considerations rather than economic, social, or political judgments.

> [T]he [National Park Service's] failure to identify and warn of the danger to barefoot visitors of hot coals on park beaches resembles more a departure from the safety considerations established in Service policies ... than a mistaken judgment in a matter clearly involving choices among political, economic, and social factors.

Id. at 1216.

[3] The appellants argue that BPA's failure to install overhead ground wires is based more on the rejection of known safety hazards than a decision grounded in economic, political or social judgment. BPA argues that the relevant design decisions involved not merely engineering analysis but the balancing of many technical, economic, and even social considerations and should not be second guessed. A review of the record supports BPA's view. The overhead ground wires are placed primarily near substations to protect the transmission system equipment. The placement of these wires in these areas is necessary to prevent power outages and disruption of service to customers. The decision to place the overhead ground wires also depends upon considerations of the likelihood of lightning strikes, the importance of the equipment to be protected, and the cost of placement of the wires. Here, as in *Kennewick*, economic considerations were dominant in the design decision. If the overhead ground wires were installed at places other than near equipment that needed to be protected, there would be no basis for limiting their placement to all power transmission lines.[4] We conclude that the decision

[4]An engineer for BPA testified as follows:

> Q. ... Do you know of any rational basis whereby overhead ground lines if required for safety of people on the ground could be limited to any particular area?

to install overhead ground wires at certain places and not others, was made not in disregard of safety considerations as in *Summers*, but was the result of a design decision based on technical, economic, and social considerations similar to the decision not to line the Kennewick canal with concrete.

B. *Subject Matter Jurisdiction.*

Appellants argue that even if the complained of omission on the part of BPA is within the discretionary function exception, BPA "should be deemed to have waived or no longer be permitted to avail itself of the discretionary function exception." Appellants Opening Brief 11. Generally, when federal courts find the discretionary exception to the Federal Tort Claims Act applies, the case is dismissed for lack of subject matter jurisdiction. *See, e.g., Roberts v. United States*, 887 F.2d 899, 900 (9th Cir. 1989); *Frigard v. United States*, 862 F.2d 201, 203 (9th Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989); *McQuade v. United States*, 839 F.2d 640, 642 (9th Cir. 1988). Appellants acknowledge the weight of precedent in favor of dismissal when the discretionary function exception applies, but argue that no court in this circuit had before it the unique facts presented here. These facts, as stated by appellants, include

> fourteen years [of] . . . litigation, . . . numerous status and pre-trial conferences, motions, three liability tri-

---

A. No.

Q. Do you know if changes were required to put in overhead ground lines, say, on this part of the . . . line involving this case, do you know of any rational basis to limit that change to less than the entire BPA system?

A. No.

Q. Or to less than the entire United States?

A. No.

> als, one damage trial, and two prior appeals to the Ninth Circuit court of Appeals. Until the third trial, the government has continuously asserted the discretionary function defense, repeatedly lost on the issue, but failed to pursue it in either the District Court or Court of Appeals.

Appellant's Opening Brief 14.

We find particularly troubling the fact that the district court specifically ruled that the discretionary function exception did not apply, and found it had jurisdiction over the case; the government then failed to raise the jurisdictional issue on the second appeal. Indeed, on appeal the government expressly stated the district court had jurisdiction pursuant to the Federal Tort Claims Act. This case thus presents a somewhat different situation than that in *Roberts v. United States*, 887 F.2d 899, 900 (9th Cir. 1989), relied on by BPA, in which we remanded for consideration of the discretionary function exception notwithstanding the failure of the government to raise it either below or on appeal. In *Roberts*, we considered the issue of subject matter jurisdiction sua sponte. Here, however, the issue was raised and decided adversely to the government below but not raised on an earlier appeal.

[4] Though we express concern about the government's ability to raise the discretionary function exception again at this late stage in this case, we find ourselves bound by precedent and hold that the district court properly dismissed this case for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction. *Insurance Corp. of Ireland, Ltd. v. Compangnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). The jurisdiction of district courts and the courts of appeals are limited by the Constitution and "those subjects encompassed within a statutory grant of jurisdiction." *Id.* Subject matter jurisdiction cannot be conferred upon the courts by the actions of the parties and principles of estoppel and waiver do not apply. *Id.* at 702. *See also Janakes v. United States*

Postal Service, 768 F.2d 1091 (9th Cir. 1985) ("parties cannot by stipulation or waiver grant or deny federal subject matter jurisdiction").

[5] Subject matter jurisdiction for suits against the government requires a waiver of sovereign immunity. *United States v. Orleans*, 425 U.S. 807, 814 (1976); *Winebrenner v. United States*, 924 F.2d 851, 853 n.1 (9th Cir. 1991); *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989). "Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). The Federal Tort Claims Act is a "grant of jurisdiction," *Dalehite v. United States*, 346 U.S. 15, 18 (1953), and provides such a waiver of sovereign immunity. *Id.* at 17. Where the discretionary function exception applies, however, this jurisdictional grant is not available. *Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987) ("the terms of [the United States'] consent define the court's jurisdiction"), *cert. denied*, 487 U.S. 1204 (1988).

Appellants rely heavily on *Stewart v. United States*, 199 F.2d 517 (7th Cir. 1952). In *Stewart*, the government failed to raise the discretionary function exception in its original answer or in the court of appeals' review of the district court's grant of summary judgment. On remand, the government amended its answer to include a claim of lack of jurisdiction, alleging the discretionary function exception applied. *Id.* at 518. The Seventh Circuit held that the Federal Tort Claims Act "conferred general jurisdiction of the subject matter of claims coming within its purview, and the exceptions referred to are available to the government as a defense only when aptly pleaded and proven." *Id.* at 519. The court thus viewed the discretionary function exception as a waivable affirmative defense rather than an impairment of its power to adjudicate. This view of the Federal Tort Claims Act and its exceptions, however, is not followed in this circuit, or any other circuit

including the Seventh. *See, e.g., Roberts v. United States,* 887 F.2d 899, 900 (9th Cir. 1989) ("if the discretionary function applies, the claims should be dismissed for lack of jurisdiction"); *Frigard v. United States,* 862 F.2d 201, 203 (9th Cir. 1988) (if "the discretionary function applies . . . the courts lack jurisdiction"); *McQuade v. United States,* 839 F.2d 640, 642 (9th Cir. 1988) (affirming district court's dismissal for lack of subject matter jurisdiction stating that if the claim is within an exception to the Federal Tort Claims Act, "the court lacks subject matter jurisdiction"); *Garcia v. United States,* 826 F.2d 806, 809 (9th Cir. 1987) ("[f]ederal courts do not have subject matter jurisdiction over tort actions based on federal defendants' performance of discretionary functions"); *Chamberlin v. Isen,* 779 F.2d 522, 526 (9th Cir. 1985) (affirming district court's dismissal for lack of subject jurisdiction because the discretionary function applied); *Cisco v. United States,* 768 F.2d 788, 790 (7th Cir. 1985) (same).

[6] Although we recognize that, in appellant's view, this is a somewhat harsh end to this lengthy case, we find no room to balance, as appellants request we do, the policies of validity and finality.

> [T]he overturning and dismissal of a fully litigated case because the lower court lacked subject matter jurisdiction hardly comports with notions of system economy or efficiency; it can be rationalized only in terms of the importance of maintaining the principles of federalism embodied in the limited grant of power to the federal courts by Article III of the Constitution.

Wright, Miller & Cooper, *Federal Practice and Procedure* § 3522 at 73 (1984). The Constitution and Congress prescribe the boundaries of our jurisdiction and as unfair as that may seem against the background of a given set of facts, we cannot reach beyond it. Because we find that the discretionary function exception applies, the United States has not consented to

be sued in this case and we must affirm the district court's dismissal for lack of subject matter jurisdiction.[5]

CONCLUSION:

The design decision not to install overhead ground wires at the place the appellants were injured involved considerations of economic and social policy as well as technical factors and thus was a discretionary function within the meaning of the Federal Tort Claims Act. Because the discretionary function exception applies, the district court properly dismissed the case for lack of subject matter jurisdiction.

AFFIRM.

[5]Appellants also argue that the district court improperly applied the appropriate standard of care in determining the liability of BPA. Because we find that the district court properly dismissed this case due to lack of subject matter jurisdiction we do not reach this issue.

THIS PAGE LEFT BLANK INTENTIONALLY.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

KENNETH RICHARDSON, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C-76-260 RJM
NORMAN TRAPP, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C-82-122 RJM
	)	ORDER DENYING MOTION FOR RECONSIDERATION

By Order dated February 15, 1990 the court concluded that the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2680(a), was dispositive of this case and ordered judgment dismissing the plaintiffs' action.

The plaintiffs have moved for

reconsideration of that decision and for the court to enter findings on the issue of negligence. Nothing new has been presented on the discretionary function issue and the court sees no basis for changing its decision in that regard. The recent Ninth Circuit opinions cited in the referenced Order are clear.

The government argues that since the court ruled that it had no jurisdiction, it would be inappropriate to enter Findings of Fact on the negligence question.

Since it is more likely than not that this case will be appealed for the third time, it does not appear that it would be prejudicial to either party for the court to enter findings on the negligence issue. We do not need a Richardson III.

After the circuit's decision in

Richardson v. United States, 841 F.2d 993 (9th Cir.1988) sub nom. 860 F.2d 357 (9th Cir.1988), the court was required to apply the standard of care established by the Washington State Court of Appeals, Div. II in Keegan v. Grant County PUD, 34 Wn.App. 274, 661 P.2d 146 (1983).

The pertinent portion of the Keegan opinion which is applicable here reads as follows:

> A sliding scale proportional to that utilized for the standard of care should be used. If the danger posed to the public is minimal, then the utility should be afforded considerable latitude in presenting evidence of its practical operation. If the danger is lethal, then the practical operation becomes minimally relevant. The relevancy of evidence pertaining to the practical operation of the utility ultimately lies in the sound discretion of the trial court. (emphasis supplied).

34 Wn.App. at 281, 661 P.2d at 150.

It should be noted that the Keegan court, in establishing the sliding

scale, referenced "danger" vis-a-vis the voltage of the line. Without question, the line involved in this controversy is very high voltage and would be lethal to anyone coming in close proximity or contact with the conductor.

Both the undersigned and Judge Marshall Neill, who tried this case the first time, concluded that the injuries to the plaintiffs resulted from a mid-point flash carryover, a phenomenon resulting from lightening striking the conductor. The only other way the injuries could have occurred would be if the irrigation pipe had come in close proximity to or in contact with the conductor. The plaintiffs testified that they did not raise the pipe. Moreover, the nature and location of the injuries which the plaintiffs suffered were inconsistent with the argument that the pipe had been raised to come in such

proximity or contact. There is no question that a mid-point flash carry-over, as was the case here, is a very unusual phenomenon.

The rule in Keegan obviously embraces some element of forseeability. Keegan would appear to require management of utilities to evaluate the danger posed to the public, and evaluate what can or should be done to minimize or alleviate that danger consistent with the practical operation. Obviously, if the danger is minimal and efforts to eliminate that danger would significantly impact the practical operation of the utility, the utility is empowered to exercise reasonable discretion.

The evidence in this case establishes that the likelihood of injury to the public caused by a mid-point flash carryover was remote, in other words it was minimal under Keegan.

Therefore, the sliding scale referenced in Keegan requires the court to give greater consideration to the factors which impact the practical operation of the utility than would be required if the danger was greater. Again, the court feels bound to differentiate between the energy in the line and the danger which the public is exposed to. The only contention of negligence which remains in this case is the failure of defendant to install overhead ground wires. It is beyond question that the installation of such wires would be an expensive proposition. The experts for the defendant testified that such installation would be foolishness considering the cost of installation and maintenance, as compared to the remote probability of danger to the public.

The standard set forth by the Ninth Circuit in Richardson v. United States

presented the court with a virtual dilemna. The difference between the rule established in that case and the rule applicable to an insurer or the rule of strict liability is almost indistinguishable. Keegan however, is a different proposition. The court concludes that the risk of danger of persons being injured by virtue of a mid-point flash carryover was so remote that no need existed for the installation of overhead ground wires. Under the standard of Keegan which the court must apply, the court finds:

1. That the incident which resulted in injuries to the plaintiffs was so unusual that danger to the public was minimal.

2. That the risk of danger from such a phenomenon was so remote that no reasonable person skilled in the industry would have

concluded that installation of overhead ground wires would be appropriate; the cost of such installation compared with the remote risk would not be consistent with the practical operation of the utility under the Keegan standard.

In order to do everything possible to avoid another trial of this action, the court will address the question of Richardson's damages.

The court found in the damage phase of the trial that Mr. Richardson was entitled to damages in the sum of $1,293,094.00. The court then reduced the damages to the maximum set forth in Mr. Richardson's administrative claim under the FTCA. The circuit ruled otherwise and held that Mr. Richardson's damages should be determined without regard to the amount set forth in the administrative claim. Therefore, the

court concludes that the damages to Mr. Richardson equal $1,293.094.00.[1] In summary therefore, the court concludes:

1. That there was no actionable negligence on the part of the defendant under the rule of Keegan.

2. If in fact the defendant was negligent, and, if that negligence was the proximate cause of the plaintiffs' injuries, the plaintiffs' claim is foreclosed by the discretionary function exception as provided in the Memorandum and Order of February 15, 1990.

The Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

DONE BY THE COURT THIS 4th day of May, 1990.

/s/
Robert J. McNichols
United States District Judge

[1] See Richardson II, 841 F.2d at 998-99.

THIS PAGE LEFT BLANK INTENTIONALLY.

A-25

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

KENNETH RICHARDSON, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C-76-260 RJM
NORMAN J. TRAPP, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C-82-122 RJM MEMORANDUM OPINION

The long and convoluted history of this case need not be recited in this Memorandum and Order. That history is adequately set forth in previous unpublished decisions of the district court and in Richardson v. United States 645 F.2d 731 (9th Cir.1981) ("Richardson I") and in Richardson v. United States, 841 F.2d 993 (9th Cir.1988) ("Richardson

II"). Richardson II was subsequently modified, Richardson v. United States, 860 F.2d 357 (9th Cir.1988). Subsequent to the remand directed by Richardson II (as amended) the court conducted an evidentiary hearing to determine the issue of liability by applying the standards set forth in Keegan v. Grant County PUD, 34 Wn.App. 274, 661 P.2d 146 (1983).

Prior to the evidentiary hearing, the court concluded it would be unnecessary and unproductive to require the parties to relitigate the following issues:

1. The events which took place on the date the plaintiffs were injured.

2. The specific cause of the injuries, i.e., whether the plaintiffs raised the pipe or whether it came into contact or

close proximity to the conductor, or whether their injuries were the result of mid-point flash carryover, and

3. The damages plaintiff suffered.

At the hearing the government argued that the court was without jurisdiction for the reason that the plaintiffs' claim was foreclosed by the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2680(a). Upon completion of the evidence, the parties were authorized to submit post-trial memoranda on the issue of liability and on the issue of the discretionary function exception.[1]

I. POSITION OF THE PARTIES

A. Plaintiff's Position

The plaintiffs contend that the

[1] The court specifically requested the parties to comment on the Roberts and KID cases, infra.

discretionary function exception was previously litigated and a determination was made which was favorable to them on that issue. Plaintiffs also cite Stewart v. United States, 199 F.2d 517 (7th Cir.1952), arguing that even if the issue had not been previously litigated, the discretionary function exception is an affirmative defense which cannot be raised at this point in the case.

The plaintiffs argue that even if the discretionary function exception can be raised at this time, there were specific statutes and regulations in existence at the time of plaintiffs' injuries which required the government to isolate and guard the power lines to avoid accidents as occurred here. Plaintiffs cite the following Revised Code of Washington and Washington Administrative Code provisions:

> RCW 80.28.010:...every...electrical company...shall furnish...in-

strumentalities and facilities as shall be safe, adequate and efficient, and in all respects just and reasonable...[and]...shall construct and maintain such facilities in connection with the manufacture and distribution of its products as will be efficient and safe to its employees and the public...

RCW 19.29.010: (6) No wire or cable, other than ground wires, used to conduct electricity, shall be placed, run, erected, maintained or used vertically on any pole without causing such wire or cable to be at all times sufficiently insulated the full length thereof to insure the protection of anyone coming in contact with said wire or cable.

WAC 296-44-005: The purpose of these rules and regulations is to formulate for the State of Washington, uniform requirements for electrical construction and installations, the installation of which shall ensure adequate service and secure safety to persons engaged in the construction, installation, maintenance, operation, or use of electrical lines and equipment and to the public in general.

WAC 296-44-289: (1) Current-carrying parts. To promote safety to the general public and to employees not authorized to approach conductors and other current-carrying parts of electric supply lines, such parts shall be

> arranged so as to provide adequate clearance from the ground or other space generally accessible, or shall be provided with guards so as to isolate them effectively from accidental contact by such persons.

According to the plaintiffs, these are mandatory statutes and regulations which govern the design and construction of power lines in Washington. The effect of these statutes and regulations here is to eliminate the discretionary function exception as a defense under the holding in Kennewick Irrigation District v. United States, 880 F.2d 1018 (9th Cir.1989) ("KID"), which held that "a safety or engineering standard operates to remove discretion under the FTCA when it is embodied in a specific and/or mandatory regulation or statute that creates clear duties incumbent upon the governmental actors."[2]

[2] The KID opinion is one of the cases which the court requested the parties to address.

Another argument advanced by the plaintiffs is that the decision by the BPA to build the Franklin-Hedges line in compliance with the National Electric Safety Code ("NESC")[3] is not protected by the discretionary function exception since it does not constitute an objective, established policy regarding the installation of overhead ground wires. The plaintiffs claim support for this argument based on the silence of the NESC on the use of overhead ground wires, and since it is representative only of minimum safety standards.

B. Government's Position

The government argues that it has continuously asserted the discretionary function exception in this case. Even

[3] The NESC is a nationally recognized, government sponsored safety standard promulgated by the Bureau of Standards. The NESC contains standards for the installation, construction and operation of electric transmission lines and other electric factilities.

if it had not been asserted, the government cites Roberts v. United States, 887 F.2d 899 (9th Cir.1989), for its holding that the discretionary function exception raises a question of subject matter jurisdiction, and, therefore, must be considered at this time.

The government contends that the decision by BPA to build the Franklin-Hedges transmission line without an overhead ground wire was a design decision. The government argues that such decisions are discretionary decisions under KID, and that the discretionary function exception eliminates liability for such decisions even if they rise to the level of negligence. The government criticizes the state statutes and regulations cited by the plaintiffs as vague, and argues that state law has no relevance to the

determination of the discretionary function exception.

The government also cites the fact that BPA decided to build the Franklin-Hedges line in compliance with the NESC in support of its position. The government contends that dismissal is warranted here since the discretionary function exception protects the BPA's decision to abide by the NESC. The government argues that BPA fully complied with the requirements of the NESC in designing and constructing the power lines which are the subject of this action, and that the NESC does not require or provide for the installation of overhead ground wires.

II. HISTORY OF THE DISCRETIONARY FUNCTION EXCEPTION IN THIS CASE

The discretionary function argument was apparently addressed tangentially before Judge Neill years back. Insofar as the court can determine the issue was

never raised by motion or ever argued. Prior to the first trial, on June 13, 1978, Judge Neill entered a Pretrial Order confirming a stipulation:

> This is an action for personal injuries asserted against the defendant by the plaintiffs under the provisioons of 28 U.S.C. § 2671 et seq.
>
> This court has jurisdiction over the parties to and subject matter of this action under the terms of 28 U.S.C. § 1346.

It is not clear to the court whether the application of the discretionary function exception was ever seriously addressed in prior proceedings. It is not addressed in any of the orders of the district court, nor in any of the opinions from the Court of Appeals. Judge Neill's Findings and Conclusions did not specifically address the discretionary function defense, but concluded:

> (1) This court has jurisdiction over the parties and over the subject matter of this action under

28 U.S.C. § 1346(b).

> (2) The Federal Tort Claims Act at 28 U.S.C. § 2674 waives sovereign immunity with certain exceptions and provides that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances.

Judge Neill ruled in the first trial that the placement of overhead ground wires upon the Bonneville transmission lines would not be consistent with the practical operation of the utility. The government did not address the issue of the discretionary function exception in the first appeal before the Ninth Circuit. Insofar as the court can determine, the discretionary function exception was not raised by the government during the second trial, nor in Richardson II.

III. DISCRETIONARY FUNCTION EXCEPTION: JURISDICTIONAL OR WAIVEABLE DEFENSE?

In Roberts v. United States, 887

F.2d 899 (9th Cir.1988),[4], the Ninth Circuit squarely addressed the nature of the discretionary function exception and the question of whether it can be raised after a trial and subsequent appeal. The court in Roberts was faced with a myriad of procedural steps which had occurred. The Roberts case involved two men who died of leukemia four years after a radioactive fallout caused by nuclear testing. The widows of the deceased individuals sued the government under the FTCA claiming the nuclear testing was the cause of their husbands leukemia. The case was tried before the District Court of Nevada in 1979.

In June, 1983, the court found for the government. In May, 1984, the plaintiffs moved to reopen the case to

[4] Roberts was originally designated "Not for Publication." The circuit subsequently determined to publish the decision.

provide more evidence. The motion was denied by the District Court and the plaintiffs appealed the denial to the Ninth Circuit. The Ninth Circuit remanded the case in 1986 for the purpose of having the District Court state its reasons for denying the motion to reopen. The District Court did so and the appeal was reinstated.

The Circuit remanded the case again, but for the limited purpose of determining if the discretionary function exception applied to the case. This was ordered even though the government had not previously raised the exception. The court states:

> "...[T]he United States did not raise this defense, but if the "discretionary function" applies, the claims should be dismissed for lack of jurisdiction. This court must consider jurisdiction even if the parties have not challeneged it."

887 F.2d at 900.

In light of the rather clear

language in Roberts the court need not address the various authorities from other jurisdictions cited by the parties. The court concludes that notwithstanding the fact that the discretionary function exception was not addressed in any previous decisions of this court or the circuit in Richardson, it is a jurisdictional matter which requires consideration by the court here.

IV. APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION TO THESE CASES

The Federal Tort Claims Act authorizes civil suits against the United States:

> "...for money damages...for injury to loss of property, or personal injury...caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employement, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission

occurred."

28 U.S.C. § 1346(b).

The discretionary function exception excludes from the purview of the FTCA "[a]ny claim...based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). This exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." Berkovitz v. United States, 108 S.Ct. 1954, 1958 (1988).

The Ninth Circuit recently analyzed the discretionary function exception at

length in the KID opinion.[5] After discussing the history of Supreme Court holdings relating to the exception, the court applied the two-step test of Berkovitz to determine if the discretionary function exception applied to the facts before the Court. This two-step test consists of the following determinations:

> (1) "Whether the action is a matter of choice for the acting employee [since] the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, and
>
> (2) if the challenged conduct does involve an element of judgment, [the] second step is to determine whether that judgment is of the kind that the discretionary function exception was designed to shield". (emphasis supplied).

KID, 880 F.2d at 1025, citing Berkovitz,

[5] Kennewick Irrigation District sued the government claiming that the Bureau of Reclamation had negligently designed and constructed a canal which caused property damage due to breaks in the canal.

108 S.Ct. at 1958.

The KID opinion is instructive on the application of the discretionary function exception to the present case. In KID, the Ninth Circuit was confronted with the question of when safety or engineering "standards" operate to remove discretion from a governmental actor. KID, 880 F.2d at 1018. The court's answer to this question was that a safety or engineering standard operates to remove discretion under the FTCA only when it is embodied in a specific and mandatory regulation or statute which creates clear duties incumbent upon the government actors.[6] Id. If the government, having balanced economic, social and political policy considerations, adopts safety standards

[6] The court noted that even a general statutory duty to promote safety would not be sufficient to preclude operation of the exception. 880 F.2d at 1026.

in the form of specific and mandatory regulations or policy, employees do not have discretion to violate these standards. 880 F.2d at 1027. The first step of the test enunciated in Berkovitz contemplates that the specific and mandatory requirement be embodied in a federal regulation, statute or policy. Berkovitz, 108 S.Ct. at 1958.

The record in the present case points to no mandatory, specific federal statute, regulation or policy which required the BPA to include overhead ground wires in the design or construction of the power lines which are in dispute. While the plaintiffs cite Washington statutes and regulations as mandatory regulations, state law is not the focus in determining if the discretionary function exception bars a

claim against the government.[7] Rather, the focus is on whether a federal statute, regulation or policy specifically prescribes a course of action for the government actor to follow: Berkovitz, 108 S.Ct. at 1958. There are no such statutes or regulations in this case. The NESC provides the only set of standards which the BPA was to adhere to, and such standards were fully

[7] Even if state statutes and regulations were the focus, those cited by the plaintiffs are either inapplicable to the design issues here, or do not specifically set forth mandatory design requirements. RCW 19.29.010(6) applies to vertical wires or cable; the lines here are horizontal. RCW 80.28.010 speaks generally to safety; a general statutory duty to promote safety is not sufficient to create clear duties upon a governmental actor. KID, 880 F.2d at 1026. WAC 296-44-005 is also a regulation which speaks generally to safety. WAC 296-44-289 is meant to prevent accidental contact with current-carrying parts; there was no contact with such parts in the accident occurring here.

complied with.[8]

V. CONCLUSION

In the KID opinion at pages 1028 and 1029, the Ninth Circuit furnishes guidance to the court in resolving the question whether the particular conduct in question falls within the discretionary function exception. In this case the record establishes the following facts and conclusions:

1. The transmission facilities were designed and constructed in compliance with the NESC,

2. There is no mandatory code, regulation or statute relating to the installation of overhead ground

[8] While the findings of this court in the earlier proceedings have concluded that the installation of overhead ground wires would likely have prevented the phenomena which injured the plaintiffs, any negligence of the BPA in failing to install overhead ground wires cannot be considered since negligence is irrelevant to the discretionary function inquiry. KID, 880 F.2d. at 1029.

wires,

3. The decision whether to install overhead ground wires is obviously a design decision, visd-a-vis, construction,

4. Bonneville elected to place overhead ground wires in some areas to protect equipment but declined to install them in other areas,

5. The failure to install overhead ground wires is the only remaining claim of negligence asserted by the plaintiffs, and

6. Applying the teachings of KID, the court cannot escape the conclusion that the failure to install overhead ground wires was a design decision within the discretionary function exception. Since the Ninth Circuit has held that the discretionary function is jurisdictional even though it may

not have been raised in prior proceedings, the plaintiffs cannot prevail.[9]

IT IS THEREFORE ORDERED:

1. These consolidated actions are dismissed,

2. The Clerk shall enter judgment accordingly and provide counsel with copies of this memorandum opinion.

DONE BY THE COURT 15th day of Feb. 1990.

/s/
Robert J. McNichols
United States District Judge

[9] It will be difficult, if not impossible, for the litigants, or for that matter anyone else, to understand how this action could wind its way through the trial and appellate courts for thirteen years and be disposed of in this manner. Each side has had temporary victories and temporary defeats. One might conclude that the only explanation is the famous quotation attributable to Charles Dickens.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

KENNETH RICHARDSON, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C76-260RJM MEMORANDUM and ORDER
NORMAN TRAPP, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C82-122RJM

Subsequent to the receipt of the mandate from the Ninth Circuit in the captioned cases, the plaintiffs moved for Summary Judgment on the record.

The court held two hearings and discussed with counsel their respective views on the scope of the mandate from the Ninth Circuit. The parties are dia-

metrically opposed. The plaintiffs contend that, at the most, the defendant would be entitled only to present additional evidence relating to the practical operation of the utility, leaving the remaining issues such as causation, damages and the like to be determined on the existing record. Conversely, the Government argues that the mandate requires a complete new trial on all issues.

Pursuant to an informal procedure established by the Circuit, the court directed a letter to the three members of the Panel on September 1, 1988. Copies of that letter were forwarded to counsel. Unfortunately there has been no response from any member of the Panel. There is no provision in the informal procedure requiring such a response and the court has now concluded that in all probability a response will not be forthcoming.

To permit this case to drag on any longer would be a manifest injustice; the

court intends to bring it to a conclusion at this level.

By letter of October 20, 1988, counsel for Mr. Richardson, Mr. Ryals, made an appropriate inquiry to the court concerning further proceedings.

The court cannot conceive, based upon the narrow scope of the circuit opinion, that the Panel meant to require that all issues be retried. The court reads the opinion as a mandate to conduct such further proceedings as are appropriate to permit the court to intelligently apply the rationale of Keegan vs. Grant County PUD, 34 Wn.App 224, 661 P.2d 146 (1983), insofar as it relates to the practical operation of the utility.

Although it is true as argued by the plaintiffs, some evidence which related to the practical operation of the utility was heard at the trial. As a practical matter, however, the case was tried in accordance with the then law of the case,

to-wit: that the issues relating to the practical operation of the utility were irrelevant. Consequently, the court concludes that it is required to conduct a further evidentiary proceeding in which the parties will be entitled to present evidence on that issue to enable the court to comply with the mandate of the circuit. On the other hand, there is no need to take additional evidence on the other issue in this case.[1]

If there is any uncertainty on behalf of counsel as to the scope of further proceedings, a telephonic conference can be arranged with the Clerk.

Counsel shall discuss among themselves an appropriate time for further evidentiary proceedings and the Clerk shall set the matter on the calendar.

IT IS SO ORDERED.

---

1 Except for the issue concerning Mr. Richardson's claim for damages in excess of the amount recited in the administrative claim.

DONE BY THE COURT this 27th day of October, 1988.

S/ ROBERT J. McNICHOLS
United States District Judge

THIS PAGE LEFT BLANK INTENTIONALLY.

A-52

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH RICHARDSON, Plaintiff-Appellee/ Cross-Appellant, vs. UNITED STATES OF AMERICA, Defendant-Appellant/ Cross-Appellee.	)	Nos. 86-4095 and 86-4119 D.C.No. CV76-260RJM ORDER MODIFYING OPINION
NORMAN TRAPP, Plaintiff-Appellee, vs. UNITED STATES OF AMERICA, Defendant-Appellant/ Cross-Appellee.	)	Nos. 86-4106 D.C.No. CV82-122RJM

Before: WRIGHT, ALARCON and POOLE, Circuit Judges.

The opinion of this court of March 14, 1988, 841 F.2d 993 (9th Cir. 1988) is amended as follows:

The last sentence of section II, 841 F.2d at 998, is amended by deleting the

period and accompanying footnote nine following the word "trial," and adding the following words: "* * * on the issue of liability and the application of the Keegan standard.9/ We leave to the sound discretion of the experienced trial judge the decision whether under all the circumstances there should be a full trial on other issues."

The opinion is further amended in part IV, 841 F.2d at 1000, by striking the period following the word "trial" at the end of that paragraph and adding thereto the words "on the issue of liability and the application of the Keegan standard."

FILED November 2, 1988

Cathy A. Catterson, Clerk
U. S. Court of Appeals

A-54

Kenneth RICHARDSON,
Plaintiff-Appellee/Cross-Appellant

v.

UNITED STATES of America,
Defendant-Appellant/Cross-Appellee

Norman J. TRAPP, Plaintiff-Appellee

v.

UNITED STATES of America,
Defendant-Appellant.

Nos. 86-4095, 86-4119 and 86-4106,

United States Court of Appeals

Ninth Circuit

Argued and Submitted Jan. 6, 1988.

Decided March 14, 1988.

Before WRIGHT, ALARCON, and POOLE, Circuit Judges.

POOLE, Circuit Judge:

These Federal Tort Claims Act cases arise out of an accident in which plaintiffs were severly burned by electricity from power lines owned and operated by the Bonneville Power

Administration (BPA), a federal agency. In a prior appeal, this Court reversed a judgment in favor of the government, holding that the trial judge had applied the wrong standard of care. Richardson v. United States, 645 F.2d 731 (9th Cir. 1981) (Richardson I). Plaintiffs prevailed on retrial and the government appeals, claiming that the district judge erroneously believed himself bound by the law of the case despite a conflicting intervening decision of the Washington Court of Appeals. We agree that the district court was in error, and accordingly, we must again reverse.

I

On May 10, 1975, plaintiffs Kenneth Richardson and Norman Trapp were moving aluminum irrigation pipes on the farm that Trapp was renting. Suspended above one part of the farm were three power transmission lines owned and operated by

the BPA. At the point where the plaintiffs were working, the lines are 30 feet above the ground.

At the time of the accident, plaintiffs were each carrying one end of a 40-foot length of pipe, and Trapp was dragging a 20-foot length of pipe behind him, resting the shorter pipe on the longer one. As they passed underneath the power lines, plaintiffs suddenly received a high-voltage charge of electricity. Both were knocked unconscious and suffered severe and permanent injuries.

The plaintiffs contend that lightning simultaneously struck the line and the pipe, causing a short circuit from the line to the pipe.[1] The government contends that the plaintiffs

[1] This phonomenon of electricity travelling through the air from a high voltage power line to the ground is known as a "midpoint flash carryover" or a "midpoint flashover."

raised the pipe into the air high enough to touch or come into close proximity to the power line.

Plaintiffs filed separate suits under the Federal Tort Claims Act.[2] Richardson's suit was tried before Judge Marshall Neill in 1978. Judge Neill found that the accident had been caused by lightning striking the power lines, causing a midpoint flashover, but he concluded that the probability of a midpoint flashover was extremely remote and that the BPA had not been negligent. In Richardson I, this court reversed and remanded for a new trial, holding that the trial judge had applied the wrong standard of care under Washington law. 645 F.2d at 735.

On remand, Trapp's suit was

[2] Both plaintiffs complied with the jurisdictional requirement of filing an administrative claim with the BPA. 28 U.S.C. § 2675.

transferred to the Eastern District and the two cases were consolidated. The liability issue was tried before Judge McNichols in March 1983. Before the judge had ruled, the Court of Appeals of Washington issued an opinion criticizing Richardson I as an incorrect interpretation of Washington law. See Keegan v. Grant County PUD, 334 Wash. App. 274, 661 P.2d 146 (1983). In his Memorandum and Order of June 30, 1983, Judge McNichols held that he was bound by the law of the case and found the defendant liable, but he certified the standard of care issue for interlocutory appeal under 28 U.S.C. § 129(b). However, the Petition for Interlocutory Appeal was filed two days late and was

dismissed[3] The trial court denied recertification.

The issue of damages was tried before Judge McNichols on October 31 and November 1, 1984. The judge issued his memorandum decision on February 10, 1986, finding the U.S. liable to Richardson for $1,093.094[4] and to Trapp for $849,891. In a Supplemental Decision on June 11, 1986, the court noted that Richardson's administrative claim had been in the amount of $950.000. Finding no changed circumstances justifying the greater

[3] The failure to take an authorized appeal from an interlocutory order does not preclude a party from raising the question on appeal from the final judgment. Baldwin v. Redwood City, 540 F.2d 1360, 1364 (9th Cir.1976), cert. denied sub nom. Leipzig v. Baldwin, 431 U.S. 913, 97 S.Ct. 2173, 53 L.Ed.2d 223 (1977).

[4] Both parties agree that the trial judge made a mathematical error and that the actual sum of the elements of damage awarded was $1,293,094.

amount, as required by 28 U.S.C. § 2675(b), the judge reduced Richardson's award to the amount of the claim.

II

Nos. 86-4095/86-4106

The dispositive issue in these appeals is whether the district court erred in applying the standard of care dictated by Richardson I despite the intervening decision of the Washington Court of Appeals in Keegan. This is a legal question which we review de novo. Louie v. United States, 776 F.2d 819, 811 (9th Cir.al985); Miller v. United States, 587 F.2d 991, 994 (9th Cir. 1978).

A.

[1,2] Under the "law of the case" doctrine, a court is ordinarily precluded from reexamining an issue previously decided by the same court, or a higher court, in the same case. See

United States v. Maybusher, 735 F.2d 366, 370 (9th Cir.1984), cert. denied, 469 U.S. 1110, 105 S.Ct. 790, 83 L.Ed.2d 783 (1985); Kimball v. Callahan, 590 F.2d 768, 771 (9th Cir.), cert. denied, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979). There is a well-established exception, however, which allows reexamination when "controlling authority has made a contrary decision of law applicable to such issues." Kimball, 590 F.2d at 771-72. Applying this exception, federal courts have uniformly held that an intervening decision of the highest state court in a case governed by state law is grounds for reconsidering the law of the case. See, e.g., Messenger v. Anderson, 225 U.S. 436, 32 S.Ct. 739, 56 L.Ed. 1152 (1912); Robinson v. Volkswagen of America, Inc., 803 F.2d 572, 574 (10th Cir.1986); Reid v. Volkswagen of

America, Inc. 575 F.2d 1175, 1176 (6th Cir.1978); cf. Handi Investment Co. v. Mobil Oil Corp., 653 F.2d 391, 392-93 (9th Cir.1981) (distinguishing intervening decision of California Supreme Court).

[3,4] We believe that the exception has equal application where there has been a dispositive intervening decision of an intermediate appellate state court. The Supreme Court has held, under the Erie doctrine, that a federal court sitting in diversity must follow an intermediate state court decision unless other persuasive authority convinces the federal court that the state supreme court would decide otherwise. West v. American Tel. & Tel. Co., 311 U.S.223, 61 S.Ct. 179, 85 L.Ed. 139 (1940); see also Estrella v. Brandt, 682 F.2d 814, 817 (9th Cir. 1982) (choosing between conflicting

intermediate state court decisions on the merits). It is undisputed that liability under the Federal Tort Claims Act is determined by the law of the state where the act or omission complained of occurred. See generally 28 U.S.C. §§ 1346(b), 2674; Richardson v. United States, 369 U.S. 1, 6-9, 82 S.Ct. 585, 589-90, 7 L.Ed.2d 492 (1962).

Our research discloses only one reported decision addressing the precise situation presented here. In Delano v. Kitch, 663 F.2d 990 (10th Cir.1981), cert. denied, 456 U.S. 946, 102 S.Ct. 2012, 72 L.Ed.2d 468 (1982), the district court refused to reconsider an issue of Kansas law decided on a prior appeal notwithstanding the intervening decision of the Kansas Court of Appeals. The Tenth Circuit, relying on West, held that the district court erred in not reconsidering the issue. 663 F.2d at

995-96. We agree with the rationale and the result reached by the Tenth Circuit. Accordingly, we hold that the district court should have reexamined the controlling state law in the light of the intervening state-court decision which specifically cast doubt upon this court's prior ruling.

Since such questions are before us de novo, our holding in Richardson I is open for reconsideration, and we now reexamine Washington law in the light shed by Keegan to determine whether the trial court's application of Richardson I prejudiced the defendant. Delano v. Kitch, supra, 663 F.2d at 996; see also Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543, 61 S.Ct. 347, 350, 85 L.Ed. 327 (1941) (under Erie, a federal appellate court must apply state law as it exists at the time of the appeal, rather than at the time of the trial).

B.

[5] In Richardson I, this court held that the standard of care imposed on a power transmission line owner or operator under Washington law was the "highest degree of care that human prudence is equal to." 645 F.2d at 732-35, citing Vannoy v. Pacific Power & Light Co., 59 Wash.2d 623, 369 P.2d 848 (1962). Admittedly, the "confusing evolution" of the standard made the question difficult, but we concluded that the state standard applied in the first trial, the "highest degree of care compatible with practical operation,"[5] was inconsistent with and had been supplanted by the Vannoy standard. We reasoned that the former standard

[5] The phrase "consistent with practical operation" was used in an earlier Washington case. Scott v. Pacific Power & Light Co., 178 Wash. 647, 35 P.2d 749 (1934), on which Vannoy was based.

"allows" expense and efficiency to balance more heavily against the risk involved than would be allowed under the [Vannoy] standard," 645 F.2d at 735, and that "the proper expense-benefit ration would be different where practicality is not taken into consideration," id. at 734-35.

Subsequent to the consolidated trial on remand, the Washington Court of Appeals decided Keegan. In that opinion, the court held that the "compatible with practical operation" language was not inconsistent with the Vannoy standard, and it specifically disapproved Richardson I:

> We do not agree with the Ninth Circuit's analysis. The omission in recent Washington cases of the entire standard of care statement from Scott should not be construed as a revocation of the "practical

> operation of the utility" from consideration by the trier of fact. A consideration of the practical operation of the utility is intrinsically included in any analysis of whether the utility exercised due care.

661 P.2d at 150 n. 2. The Keegan court explained that the extent to which a utility would be allowed to present evidence relating to its "practical operation" varied under the circumstances of each case:

> A sliding scale proportional to that utilized for the standard of care should be used. If the danger posed to the public is minimal, then the utility should be afforded considerable latitude in presenting evidence of its practical operation. If the danger is lethal, then the practical

> operation becomes minimally relevant. The relevancy of evidence pertaining to the practical operation of the utility ultimately lies in the sound discretion of the trial court.

Id. 661 P.2d at 150.

In his June 30, 1983 Memorandum, Judge McNichols concluded that he was bound by Richardson I, especially since he had conducted the second trial "under the premise that evidence relating to the practical operation of the utility is irrelevant." Consequently, in his final decision, he applied the Ninth Circuit's interpretation that "every means known, or which with reasonable inquiry would have been known, [must] be used to prevent death or injury in these circumstances." Richardson I, 645 F.2d at 735. Attempting to harmonize his holding with Keegan, he stated that "it

is arguable that the Ninth Circuit and the Washington State Court of Appeals are saying basically the same thing in different words."

Despite the judge's valiant effort in the midst of conflicting authorities to reconcile Keegan with Richardson I, it is clear that the two cases are incompatible. The trial judge interpreted Richardson I as excluding any consideration of the practical operation of the utility, whereas under Keegan, practical operation is still at least "minimally relevant." The jury instruction approved in Keegan ("the highest degree of care, the utmost care and prudence, consistent with the practical operation of Defendant's electrical distribution facilities") is very similar to the standard struck down in Richardson I ("the highest degree of care compatible with practical

operation").

In his opposition brief, Trapp cites Brashear v. Puget Sound Power & Light Co., 100 Wash.2d 204, 667 P.2d 78 (1983), and argues that the Washington Supreme Court's latest enunciation of the Vannoy standard demonstrates that Keegan is dictum and is not valid precedent. We disagree. Brashear did not concern the question whether evidence of practical operation was relevant under the Vannoy standard; it held only that the highest degree of prudence was not required where the voltage was of a low level such as that ordinarily found in homes. 6678 P.2d at 82.[6] The opinion cites Keegan in support of the Vannoy standard, and it gives no indication that the court disapproved of Keegan in any way. The

[6] It is undisputed that the voltage involved here is potentially lethal.

opinion does not cite Richardson I.[7] Under these circumstances, we believe that Keegan is valid precedent which a state trial court would be bound to follow, and we therefore decline Trapp's invitation to disregard it.

As to whether the district court's error prejudiced the defendant, we recognize that it is at least arguable that the BPA was able to present much or all of the evidence that would be considered relevant under Keegan's "minimally relevant" standard.[8] The Keegan court itself noted that the trial judge has broad discretion to limit the

[7] Richardson I was cited in support of the Vannoy standard in one intervening appellate case, Estate of Celiz v. PUD, 30 Wash.App. 682, 638 P.2d 588, 591 n. 2 (1981) but, as in Brashear no discussion of evidence of practical operation was involved.

[8] One of the difficulties is that Richardson I, unlike Keegan, did not attempt to define what it meant by "practical operation."

evidence regarding "practical operation":

> Evidence concerning the utility's practical operation addresses whether the utility has conducted its operations under the known safety methods and the present state of the art.... The admissibility of evidence relating to the practical operation of the utility is not an open door for the utility to argue the economic impact of safety measures on the ratepayers. The fact the requisite care is expense or inconvenient does not, of itself, relieve the utility of its duty to exercise commensurate care.
>
> * * * * *
>
> The trial court exercised its discretion and limited the PUD's presentation of evidence pertaining

> to its practical operation to matters directly affecting the Keegan fire. The PUD was not allowed to present testimony of its overall operation and economics and testimony of tree-trimming practices was limited to those applicable to the trees on or near the Keegan property.... The trial court's ruling limited, but did not preclude, the PUD from presenting the practical aspect of its operation to the jury. We hold there was no abuse of discretion.

661 P.2d at 150,151 (citations omitted). However, we need not decide whether any specific evidence was improperly excluded. Even if the government was not prejudiced from an evidentiary standpoint, the district court might have come to a different conclusion under the Keegan standard. It is clear

from the trial judge's remarks that he was troubled by Richardson's command to disregard the "practical operation" of the utility. See Memorandum of June 30, 1983 at 2 ("I find myself attempting to apply a rule which I cannot define."). We have no doubt that his concern to adhere to our prior ruling entered into his ultimate determination regarding liability. We must therefore remand for a new trial.[9]

III

No. 86-4119

[6] In his cross-appeal, Richardson challenges the supplemental decision

[9] We recognize that Richardson's original trial was conducted under a standard which we now hold to be proper under Washington law. However, while it is our duty to decide this appeal in accordance with the law as it now exists, we cannot reinstate the original judgment in Richardson's which was rendered a nullity by the prior decision of this court. Consequently, Richardson's case must be remanded along with Trapp's for a new trial.

reducing his damage award for $1.29 million to $950,000. Although this issue is potentially mooted by our reversal on liability, it may arise again if Richardson should prevail on remand. Accordingly, we will address the issue.

Richardson's original complaint, like his administrative claim, prayed for damages in the amount of $950,000. After the trial court's decision, the government pointed out the conflict between the award and the claim, citing 28 U.S.C. § 2675(b), which provides:

> Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of

> presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

In response, Richardson moved to amend his complaint to conform to the proof adduced at trial, alleging that the amputation of his leg and the resulting psychological problems constituted intervening facts that were not reasonably discoverable on July 5, 1975, the date the administrative claim was filed.

In its Supplemental Memorandum Decision of June 11, 1986, the district court denied Richardson's motion to amend his complaint, finding:

> The amputation of the leg occurred prior to the commencement of the action; the record is not clear as to when the alleged psychological

injuries resulted. It is clear, however, that they all took place prior to the trial.

The judge therefore limited Richardson's recovery to the amount of his claim.

We believe the trial court misapprehended the nature of the findings required by § 2675(b). The trial court believed that Richardson was barred from seeking a greater amount because the alleged intervening facts had occurred prior to trial. However, on its fact § 2675(b) requires only that newly discovered evidence must have come to light after the date of the claim, and other courts have held that intervening facts should be treated likewise. See Low v. United States, 795 F.2d 466, 470 (5th Cir.1986) ("the allegedly newly discovered evidence or intervening facts must not have been reasonable capable of detection at the

time the administrative claim was filed"); Husovsky v. United States, 590 F.2d 944, 954 (D.C.Cir.1978) ("...unless during the time between the filing of the administrative claim and the filing of the lawsuit there are intervening facts or newly discovered evidence.").

Here, it is not disputed that the amputation and the psychological disorder occurred after the claim was filed. However, the parties do dispute whether these injuries were reasonably foreseeable at the time the original claim was filed. Thus, if Richardson should prevail on remand, the district court should determine whether the full extent of Richardson's injuries was reasonably forseeable as of July 5, 1975. Compare Powers v. United States, 589 F.Supp. 1084, 1109-10 (D.Conn.1984) (although plaintiff's claim alleged a general postoperative paralysis,

increasing degree of paralysis, worsening pain and unanticipated need for extensive nursing care constituted intervening facts) and McDonald v. United States, 555 F.Supp. 935, 957-61 (M.D.Pa.1983) (changes in plaintiff's physical and emotional condition constituted newly discovered evidence) with Low, 795 F.2d at 471 ("There is no evidence that these conditions became worse or that other conditions developed after the claim was filed") and Kielwien v. United States, 540 F.2d 676, 680 (4th Cir.), cert denied, 429 U.S. 979, 97 S.Ct. 491, 50 L.Ed.2d 588 (1976) ("[The] diagnoses and advice were thus cumulative and confirmatory of what plaintiff had largely already been told").

[7] As to whether Richardson should be allowed to amend his complaint at this late date, we note that under

either Rule 15(a) or Rule 15(b) of the Federal Rules of Civil Procedure, leave to amend should be "freely granted" where the opposing party will not be prejudiced thereby. A mere passage of time, by itself, is insufficient; rather, there must be an affirmative showing of either prejudice or bad faith. Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1287 (9th Cir.1985), cert. dismissed, ---U.S.---, 107 S.Ct. 450, 93 L.Ed.2d 397 (1986) (two-year delay insufficient); Howey v. United States, 481 F.2d 1187, 1190-91 (9th Cir.1973) (five-year delay insufficient). Accordingly, on remand the district court should determine whether the government would be prejudiced by allowing the amendment.

IV

We regret that this already protracted litigation must be further

prolonged by this remand, but we see no other choice. In a case governed by state law, a federal court is not free to disregard an intervening decision of a state appellate court, even if it requires a reexamination of the law of the case. We therefore reverse and remand for a new trial.

REVERSED AND REMANDED

A-82

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KENNETH RICHARDSON, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C76-260RJM SUPPLEMENTAL MEMORANDUM DECISION
NORMAN TRAPP, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C82-122RJM

The Memorandum Decision of February 10, 1986, which constituted the court's Findings of Fact and Conclusions of Law, is amended and supplemented as set forth below.

1. Mathematical error in calculating Richardson's damages. The parties advised the court of a mathematical error

in the computation of the damages awarded to Mr. Richardson. In view of the court's disposition of the administrative claim issue below, this matter need not be discussed.

2. Subsequent to the entry of the above-mentioned Memorandum Decision, the goverment called the court's attention to the fact that the administrative claim filed on behalf of Mr. Richardson was in the amount of $950,000.00 and that an award in any greater sum was prohibited by 28 U.S.C. §2657(b).

Richardson responded alleging that changed conditions occurred between the time of the filing of the administrative claim and the trial and argues that the court should therefore award damages in excess of the amount set forth in the claim.

This issue was not discussed by either party during any phase of the trial and was raised for the first time after the

court's Memorandum Decision of February 10, 1986.

A review of the file reflects the following:

(a) Both the complaint and the Pre-trial Order claimed damages in the amount of $950,000.00.

(b) The changed conditions which were urged by plaintiff Richardson are:

(1) The unforseen need to amputate Mr. Richardson's leg; and

(2) Unforseen psychological deficiencies resulting from the injury and the amputation.

The amputation of the leg occurred prior to the commencement of the action; the record is not clear as to when the alleged psychological injuries resulted. It is clear, however, that they all took place prior to the trial.

Because of the foregoing I feel compelled to limit Mr. Richardson's recovery to the amount of the claim, to-wit:

$950,000.00.

Since it is very likely this case will be appealed, I feel it is appropriate to comment further on other legal issues.

The discretionary function exception. There are three recent Ninth Circuit decisions in which the court addresses this exception to Federal Tort Claims Act liability. Mitchell v. United States, 787 F.2d 466 (9th Cir., 1986); Henderson v. United States, 784 F.2d 942 (9th Cir., 1986); and Begay v. United States, 758 F.2d 1059 (9th Cir., 1985). Unless I am missing something, these cases seem to create direct conflict on this issue. Assuming that I am correct, I am satisfied that we have not heard the last word on this issue. Considering the facts and circumstances of this case and the above-cited cases, I decline to apply the discretionary function exception.

For the reasons set forth in the Memorandum Decision of February 10, 1986 and

the reasons set forth above, it is hereby ORDERED:

1. The Clerk shall enter judgment in favor of the plaintiff Richardson in the sum of $950,000.00.

2. The Clerk shall enter judgment in favor of the plaintiff Trapp in the sum of $849,891.00.

DONE BY THE COURT this 10th day of June, 1986.

S/ ROBERT J. McNICHOLS
United States District Judge

Filed in the U. S. District Court
Eastern District of Washington
June 11, 1986
J. R. Fallquist, Clerk

THIS PAGE LEFT BLANK INTENTIONALLY.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KENNETH RICHARDSON, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C76-260RJM MEMORANDUM DECISION
NORMAN TRAPP, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C82-122RJM

These consolidated cases were tried by the court without a jury. The case of Richardson v. United States had been previously tried and appealed to the Ninth Circuit. See Richardson v. United States, 645 F.2d 731 (9th Cir., 1981).

Subsequently, the case of Trapp v. United States was consolidated with Rich-

ardson and the liability phase was retried. Subsequent to the completion of the liability phase of the second trial, the intermediate court of appeals in the State of Washington decided Keegan v. Grant County PUD, 34 Wn.App. 274, 661 P.2d 146 (1983). In Keegan, the Washington Court of Appeals stated its disagreement with the Ninth Circuit's analysis in Richardson I.

By order dated June 29, 1983 (a copy of which is attached hereto) the court certified certain questions to the Ninth Circuit in accordance with 28 U.S.C. 1292(b). For some reason the government's request for discretionary appeal was not filed within the prescribed ten-day period and the appeal was dismissed. The Circuit, in dismissing the appeal, declined to comment on the efficacy of a recertification by the district court.

As a result of all of the foregoing, the damage phase of the trial was com-

pleted.

The following facts are either totally undisputed or clearly established by the evidence. In May of 1975, plaintiffs Richardson and Trapp were in the process of moving irrigation pipes across a pasture. The irrigation pipes were made of aluminum, one of which was 40 feet in length.

Government owned and operated high voltage power lines crossed over the Trapp farm. The power line complex is known as the Franklin-Hedges 115 kv line. The low point of the line across the Trapp farm was thirty feet above the ground. The voltage transmitted is such that close proximity or direct contact with the line would prove fatal.

At the time of the occurrence which is the subject of these proceedings, plaintiffs Richardson and Trapp were carrying the forty-foot length of pipe horizontally at hip level each holding one end

of the pipe. In addition, Trapp carried a shorter piece of pipe dragging one end on the ground and crossing over the longer piece of pipe. As the two men walked beneath the power line they suddenly received a high charge of electricity. Both were knocked unconscious and suffered severe and permanent injuries. Without question the energy from the line caused these injuries. There is a dispute as to precisely what caused the energy from the line to reach the pipe.

The government contends that the injuries resulted from the forty-foot pipe being raised in the air high enough to touch or came in close proximity to the line, and that the accident could not have occurred in any other manner. The plaintiffs, on the other hand, contend that the injuries were caused by a phenomenon known as "midpoint flash carryover." The testimony was that lightning struck the line causing the energy from

the line to be diverted downward to the pipe being carried by the plaintiffs thereby causing the injuries.

Richardson and Trapp both testified that the last they remember they were carrying the pipe in a horizontal position approximately at hip level, each of them holding an end. They testified that they did not raise the pipe to a vertical position. The fact that both plaintiffs were burned on the hands and the lower part of the body, specifically the hips and legs, seems inconsistent with the government's theory that the pipe had been raised high enough to come in contact with a conductor thirty feet above the ground.

One strange thing about the positions of the parties is that the government's liability might be more firmly established if the accident happened in the way which the government contends. This is true, because Bonneville had knowledge

that forty-foot sections of pipe were commonly used for irrigation in fields beneath conductors which sagged to within thirty feet of the ground. Moreover, there have been a number of incidents where death or serious injury occurred because of the momentary forgetfulness of farmers in raising a section of pipe for purposes of moving it and contacting the conductor. Consequently, I conclude, as did Judge Neill in the first trial, that the accident happened as a result of the midpoint flashover caused by lightning.

I will now address the duty of the government in taking precautions to prevent injury from such high voltage conductors. In reversing Judge Neill's decision in the first trial, the Ninth Circuit, construing Washington law, concluded that the trial court applied the wrong standard of care. Judge Neill ruled that the BPA was required to use "the highest degree of care compatible

with practical operation of the utility." The Ninth Circuit, in reversing, ruled that Bonneville had the duty of utilizing every means known or which with reasonable inquiry would have been known to prevent death or serious injury in the circumstances, without regard to "practical operation."

The Washington Court of Appeals in Keegan, although stating its disagreement with the Ninth Circuit's analysis, did state "The fact that the requisite care is expensive or inconvenient does not, of itself, relieve the utility of its duty to exercise commensurate care." Keegan, 34 Wn.App. at 280.

The evidence in this case establishes that the installation of overhead ground wires between the towers and above the conductor would prevent lightning from striking the conductor. In fact, Bonneville utilizes such overhead ground wires on some of its extremely high voltage

conductors but maintains they are for the protection of the facilities, not to prevent an accident such as this. The experts for the plaintiffs testified, however, that such overhead ground wires would prevent such an incident. It is true the installation of such overhead ground wires throughout the Bonneville system would be expensive. It is argued by the government that since a phenomenon such as a midpoint flash carryover is extremely unusual, the installation of such overhead grounds would not be prudent.

If the standard espoused by the Ninth Circuit in the first appeal in this case is applied, that is that the "practical operation" of the utility is not compatible with the "highest degree of care that human prudence is equal to" there are a number of things which could have been done and could yet be done to prevent serious injuries from these con-

ductors. For example, the government could acquire the fee to the entire right-of-way and place fences along each boundary with large warning signs; it could install the overhead ground wires. To avoid contact with the irrigation pipe it could construct its facilities a greater distance from the ground.

The Washington Court of Appeals in discussing practical operation of the utility stated "If the danger is lethal, then the practical operation becomes minimally relevant." Keegan, 34 Wn.App. at 281. The energy in the power line here involved was clearly lethal.

It is arguable that the Ninth Circuit and the Washington State Court of Appeals are saying basically the same thing in different words. Both courts hold that when the wires carry a strong and dangerous current of electricity, the utility must exercise the highest degree of care that human prudence is equal to.

In this case, the following facts are clear:

1. The plaintiffs' injuries were caused when lightning struck the conductor and in some manner diverted the energy to the pipe which the plaintiffs were carrying.

2. Lightning storms are not uncommon in the area.

3. There was a "front" in the area of the accident at the time in question.

4. There was a burn mark on the conductor which could have been caused either by contact with the pipe or by lightning diverting the energy in the line down to the point where it struck the pipe. I have concluded under the circumstances that the conductor was not contacted by the pipe nor was the end of the pipe in close proximity to the conductor.

5. Had the power line been equipped with an overhead ground system a lightn-

ing strike would have been diverted and grounded and the injuries would not have occurred.

6. There were no visible warning signs to remind the public of the existence of the lines or of any danger in being in proximity to them during an electrical storm.

7. The Government was aware that people routinely work beneath the conductors moving irrigation pipe from one place to another.

8. The danger from the conductors in question is clearly lethal. Therefore, even under Keegan, practical operation becomes "minimally relevant."

9. The phenomenon of "midpoint flash carryover" was known to the Government but was an unusual occurrence.

10. If the accident had occurred as the Government contends it did, foreseeability would be greater than was the foreseeability of the midpoint flash

carryover.

CONCLUSIONS OF THE LIABILITY ISSUE

1. Plaintiffs' injuries resulted from the energy from the conductor being diverted by lightning to the pipe which they were carrying.

2. The energy being transmitted was "lethal" to anyone exposed to it.

3. The cost of preventing such injuries would be substantial but preventative measures were otherwise feasible.

4. No actions or inactions by the plaintiffs constituted negligence.

5. The Government is liable to the plaintiffs for their injuries.

In reaching the conclusion that the government is liable in this case, I am cognizant of the difficulties faced by the government and other operators of high voltage transmission lines. The distinction between the duty imposed by existing case law and the rule of strict liability is a fine one indeed. Unless

and until the problem is addressed through legislation, operators of such facilities must live with exposure to liability which is very difficult to avoid.

DAMAGES

The testimony relating to medical expenses, past and future, lost wages, past and future and general damages was somewhat extended and complex. Based on the evidence I find that Mr. Richardson and Mr. Trapp are entitled to damages as follows:

Richardson

1. Past and future medical and hospital expenses	$ 53,125
2.* Lost earnings from time of injury through 1985	82,000
3.**Loss of future earnings	207,969
4. Damages for permanent injuries, and pain and suffering	950,000
	$1,093,094

Trapp

1. Past medical and hospital expenses	$ 21,847

2. Future medical care	8,500
3.* Lost wages and benefits from date of injury through 1985	233,544
4.**Impairment of future earning capacity	86,000
5. Damages for permanent injuries and pain and suffering	500,000
	$ 849,891

Based upon the testimony I have concluded that the loss of future earnings should not be discounted to present value because the apparent discount rate is approximately equivalent to the present rate of inflation.

Entry of judgment will be deferred for ten days to permit counsel to direct the court's attention to any errors or oversights. This Order constitutes Findings of Fact, Fed.R.Civ.P. 52(a).

IT IS SO ORDERED.

DONE BY THE COURT this 10th day of February, 1986.

S/ ROBERT J. McNICHOLS
United States District Judge

* Calculated at present market value, and applying a net 10% average income tax to overall lost earnings.

** Calculated on basis that discount rate and inflation rate offset one another. Future earnings reduced by a 23% income tax factor.

THIS PAGE LEFT BLANK INTENTIONALLY.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KENNETH RICHARDSON, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C76-260RJM ORDER
NORMAN TRAPP, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C82-122RJM

The government's petition for interlocutory review by the Ninth Circuit was dismissed as untimely by Order dated August 29, 1983.

In commenting on the propriety of recertification of the issue by the District Court, the Circuit cited Aparico v. Swan Lake, 643 F.2d 1109 (5th Cir.,

1981). However, the Circuit declined to address the question in this case whether a further order certified by the district court would suffice to confer jurisdiction.[1]

In my judgment it is time to bring this litigation to a conclusion at the district court level. I can envision some difficulty explaining to the plaintiff, Mr. Richardson, why an action commenced in 1976 is still enmeshed in technical

---

1 To avoid possible further confusion I must point out some inaccuracies in the order of the Ninth Circuit dismissing the appeal. The order of the Circuit recites that the Order of certification was entered on November 2, 1982, the petition for permission to appeal was filed on November 15, 1982 and the petition was granted on January 21, 1983.

As a matter of fact the order incorporating the certification was filed on June 30, 1983, the government's petition for review was mailed July 11, 1983 and received by the Clerk of the Ninth Circuit on July 13, 1983. Notwithstanding this mixup, the government concedes that the petition for interlocutory review was untimely.

proceedings in late 1983.

The government's motion for an order recertifying the issue to the Ninth Circuit will be denied.

Counsel are directed to consult with the Clerk and set an early date for trial of the damage phase of these consolidated cases.

IT IS SO ORDERED.

DONE BY THE COURT this 29th day of November, 1983.

S/ ROBERT J. McNICHOLS
United States District Judge

THIS PAGE LEFT BLANK INTENTIONALLY.

A-105

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KENNETH RICHARDSON, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C76-260RJM MEMORANDUM and ORDER
NORMAN TRAPP, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C82-122RJM

The liability phase of this case has been completed and submitted to the Court for decision.

The law of this case was established by the Ninth Circuit in Richardson v. United States, 645 F.2d 731 (9th Cir., 1981). In deciding the liability issue in this case, I am bound by the Ninth Circuit

decision to impose upon the defendant, Bonneville Power Administration, the highest degree of care that human prudence is equal to. This duty requires that every means known, or which with reasonable inquiry would have been known, be used to prevent death or serious injury in these circumstances. Moreover, the foregoing rule must be applied without regard to the practical operation of the utility.

In Richardson, the Ninth Circuit although establishing the foregoing as the law of the case, held that the duty imposed was not that of an insurer nor was it absolute or strict liability.

I find myself attempting to apply a rule which I cannot define.

Subsequent to the recent trial and on March 17, 1983 the Washington Court of Appeals decided Keegan v. Grant County PUD, 34 Wn.App. 274, _____P.2d_____,

(1983, Div. III).[1] In that opinion the Washington Court stated at page 280 n.2 in referring to Richardson:

> We do not agree with the Ninth Circuit's analysis. The omission in recent Washington cases of the entire standard of care statement from Scott should not be construed as a revocation of the "practical operation of the utility" from consideration by the trier of fact. A consideration of the practical operation of the utility is intrinsically included in any analysis of whether the utility exercised due care.

The duty of the Federal District Court sitting in diversity is to ascertain from all available data what the state law is and apply it. "An intermediate state appellate court decision is a 'datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court in the state would decide otherwise.'" Estrella v. Brandt,

---

1 I have been advised that the parties have not and will not seek review by the Washington Supreme Court.

682 F.2d 814 (9th Cir., 1982) citing West v. A.T.&T. Co., 311 U.S. 223 (1940).

I am now presented with a situation in which the interpretation of the decisions of the Washington Supreme Court by the Ninth Circuit differs from the interpretation of those decisions by the Washington Court of Appeals.

I have concluded that I must follow the interpretation of Washington law as announced by the Ninth Circuit in Richardson. The legal issue is of substantial importance. Since the Ninth Circuit has established the law of this case, it is that tribunal which should have the opportunity to review this order and make such determination as it deems appropriate. I have entertained the thought of certifying this question to the State Supreme Court; however, that is an option which the Circuit may or may not elect to exercise.

I therefore conclude that the duty

owed by the defendant in this case is the duty as set forth in the Richardson decision by the Ninth Circuit.

The second trial of the liability issue recently concluded was conducted under the law of the case established by Richardson. Consequently the parties and the Court were operating under the premise that evidence relating to the practical operation of the utility would be irrelevant.

I find that the evidence establishes liability on the defendant under the law of the case as indicated above. For purposes of this order and since the damage phase of the case has not been tried, it is not necessary to enter detailed findings of fact at this time.

IT IS THEREFORE ORDERED that the defendant is liable to the plaintiffs for damages.

It is my opinion that this order involves a controlling question of law as

to which there is substantial ground for difference of opinion. It seems axiomatic that this difference of opinion between the Ninth Circuit Court of Appeals and the Court of Appeals of the State of Washington constitutes a "substantial ground." The specific controlling questions of law are:

(1) Whether the Court in determining if the defendant exercised the highest degree of care that human prudence is equal to must consider evidence relating to the practical operation of the utility.

(2) If the Ninth Circuit concludes that such evidence should be considered, will the District Court's (Judge Neill) initial decision be reinstated or shall the District Court conduct further proceedings.

An immediate appeal from this order may materially advance the ultimate termination of this litigation. See 28

U.S.C. §1292(b). The statute requires that application for appeal must be made to the Circuit within ten days after the entry of this Order.

In the event an appeal is taken and in the event the Ninth Circuit permits appeal, further proceedings in this Court shall be stayed until disposition at the Circuit level.

IT IS SO ORDERED.

DONE BY THE COURT this 29th day of June, 1983.

S/ ROBERT J. McNICHOLS
United States District Judge

THIS PAGE LEFT BLANK INTENTIONALLY.

A-112

Kenneth RICHARDSON
Plaintiff-Appellant,

v.

The UNITED STATES of America,
Defendant-Appellee.

No. 79-4516.

United States Court of Appeals,

Ninth Circuit,

Argued and Submitted March 5, 1981.

Decided May 18, 1981.

Rehearing Denied Aug. 13, 1981.

REED, District Judge:

Kenneth Richardson appeals the judgment entered against him by the District Court on July 17, 1979, following a non jury trial, on his claim under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq.

The original claim for relief was submitted to the Bonneville Power Administration (hereinafter BPA) on June

25,1975, pursuant to 28 U.S.C. § 2675. A complaint against the BPA was subsequently filed in the trial court on September 30, 1975. Later, by agreement, the United States was substituted as the party defendant in place of the BPA.

The appellant's original claim, and now this appeal, derive from a most unfortunate occurrence on May 10, 1975, in Benton County, Washington. The appellant, an eighteen year old high school student, had gone to visit his sister and brother-in-law, Mr. and Mrs. Norman Trapp, at a farm they leased in Benton County. While there, he assisted his brother-in-law in moving irrigation pipes across a pasture. The irrigation pipes were of varying lengths and made of aluminum.

High-voltage power lines cross over the Trapp farm. The lines are known as

the "Franklin-Hedges 115KV line" constructed and maintained by the BPA, an agency of the defendant. While no supporting structures are located on the farm, the line crosses that property between poles 4/6 or 5/6 and 4/7, a span of some 776 feet. The line, composed of uninsulated aluminum and steel, sags to a low point of about 30 feet above the ground. The normal amount of energy transmitted through the line is approximately 35 MW. Direct contact with this high voltage line would be fatal.

At the time of the occurrence which is the subject of these proceedings, appellant and Trapp were carrying a forty-foot length of the irrigation pipe, horizontally, at hip level, with appellant at one end and Trapp at the other. In addition, Trapp carried a shorter piece of pipe,

dragging one end on the ground and crossing over the longer piece of pipe.

As the two walked beneath the power line, lightning struck the line causing a short circuit from the line to the pipe being carried by appellant and Trapp. This phenomenon of electricity traveling through midair from the high voltage line to the ground by way of the pipe is termed "midpoint flashover."

As a result of this "midpoint flashover" the appellant and his brother-in-law were severely shocked and burned on their hands and lower portions of their bodies. Both were knocked unconscious and appellant's injuries later necessitated the amputation of his left leg.

Appellant presents one question on appeal:

Did the trial judge apply the proper legal standard in determining

whether defendant was liable for the consequences of the electrical shock received by the appellant due to "midpoint flashover" from the high voltage transmission line?

Under the Federal Tort Claims Act, tort liability is determined by the law of the state where the act or omission complained of occurred. 28 U.S.C. §§ 1346(b), 2674. See generally Southern Pacific Transportation Co. v. United States, 462 F.Supp. 1193 (E.D.Cal.1978). The United States "shall be liable, . . . in the same manner . . . as a private individual under like circumstances . . ." 28 U.S.C. § 2674. The basic problem now presented to this Court is what was the proper standard of care, which should have been applied by the court below, according to the law in the State of Washington.

The trial court stated, in its

conclusions of law, that the standard of care imposed upon a private power transmission line owner or operator is the "highest degree of care compatible with practical operation." Appellee supports this as the proper standard to apply, citing Hever v. Puget Sound Power and Light Co., 34 Wash.2d 231, 208 P.2d 886 (1949); Scott v. Pacific Power and Light Co., 178 Wash. 647, 35 P.2d 749 (1934); Hass v. Washington Water Power Co., 93 Wash.291, 160 P. 954 (1916); White v. Reservation Electric Co., 75 Wash. 139, 134 P. 807 (1913); Mayhew v. Yakima Power Co., 72 Wash 431, 130 P. 485 (1913).

It is appellant's position that the proper standard of care imposed upon the BPA was "the highest degree of care that human prudence is equal to." Appellant argues that the qualification in the standard of care applied by the judge,

"compatible with practical operation of the utility," has not been used since 1949, the date of the Heber decision, supra. See Vannoy v. Pacific Power and Light Co., 59 Wash.2d 623, 369 P.2d 848 (1962), Frisch v. Public Utility District, 8 Wash.App. 555, 507 P.2d 1201 (1973) and Wray v. Benton County P.U.D., 9 Wash.App. 456, 513 P.2d 99 (1973); See also Amant v. Pacific Power and Light, 10 Wash.App. 785, 520 P.2d 181 (1974).

At first glance it appears that to distinguish the two standards would be but a mere exercise in semantics. A closer look at the application of each to the facts originally at issue in this case creates a meaningful difference that may have substantially affected the trial court°s judgment.

At trial appellant argued that certain precautions, such as the

installation of ground or "shield" wires, might have prevented the accident. On the other hand, appellee contended and the trial court found that though these ground wires dissipate the effect of lightning on the lines, their use was to prevent power outages and to insure system reliability. The court also found that such ground wires may or may not have prevented a "midpoint flashover."

The BPA did not use ground wires in the area of the accident. The BPA did use the ground wires on other portions of the Franklin-Hedges line and over other lines which transmit extra high voltage in the 345-500 KV range. The court found that the installation of ground wires over all power lines would be impractical because of the high cost in comparison to possible benefits, and thus would burden the practical

operation of the utility. This was especially true in light of the trial court's determination that the probability of "midpoint flashover" is extremely remote.

The evidence as to whether or not this occurrence was foreseeable, and whether or not it could have been prevented, was through the testimony of Dr. William Lewis, an electrical engineer and expert, for the plaintiff, and Mr. Yasuda, the head of the High Voltage Unit and System Reliability for the BPA. It appears the trial court, having heard the testimony and judged its credibility, chose to adopt the testimony presented by appellee's expert, Mr. Yasuda. He presented credible evidence to support the trial court's findings of fact and this Court is bound by those findings unless clearly erroneous. See Fed.R.Civ.P.

52(a); Roemer v. Maryland Public Works Board, 426 U.S. 736, 758, 96 S.Ct. 2337, 2350, 49 L.Ed.2d 179 (1976).

Without concerning itself with the findings of fact, or whether the trial court's judgment would be the same under either of the standards of care contended for, this Court must determine first if the two standards do in fact differ.

The existence of a distinction is relevant to determine the possibility that the trial court may have considered the various factors of foreseeability, practicality, expense, benefit, and prudence in a different light.

Appellant relies on three of the most recent Washington decisions relevant to this case. Wray, supra; Frisch, supra; and Vannoy, supra. Those cases involve personal injury actions against electrical utilities in regard

to their liability arising from the maintenance and control of outside, high-voltage lines. All three rely on the standard set forth in Vannoy, supra, 369 P.2d at 852-53, i.e., "the highest care that human prudence is equal to."

Appellee asserts that its cases, the latest of which was decided in 1949, state the relevant standard applicable, i.e., "the utmost care and prudence consistent with practical operation of its plant . . ." See Heber, supra; Scott, supra; White, supra.

The difficulty of determining the proper standard of care in this case stems from the confusing evolution of the present standard applied by Washington courts. This point is most clearly illustrated by reference to the cases cited by both parties on appeal. Vannoy, the principal case relied on by appellant to support his interpretation

of the proper standard of care, apparently is derived from the standard set forth in Scott, a case cited by appellee in support of its proposed standard of care.

Vannoy cites Scott as the basis of its standard as follows:

> "'* * * the amount of care necessary varies with the danger which is incurred by negligence, for a prudent and reasonable man increases his care with the increase of danger. If but little danger is incurred, as, for instance, when the wires carry only a harmless electric current, such, for instance, as the telegraph or telephone current, only ordinary care may be required. While if the wires carry a strong and dangerous current of electricity, so that negligence will be likely to result

> in serious accidents, and perhaps death, or if a harmless wire is in dangerous proximity to a high tension wire, a very high degree of care, indeed, the highest that human prudence is equal to, is necessary. This is particularly true of electric light and electric railway wires, which carry a high tension current often of great danger. * * * '"

Vannoy, supra, 369 P.2d at 852-53, citing Scott, supra, 35 P.2d 751. This quotation from the Scott opinion follows a portion of the opinion cited by the appellee which contains the provision stating that the duty imposed on a utility was to exercise the "utmost care . . . consistent with practical operation. . . ." Scott, supra, 35 P.2d at 751, citing 9 R.C.L. § 13 at 1199.

Further along in the Scott case the

Washington court states:

> Where death or serious injury may be caused by an agency lawfully in use, ordinary care requires that every means known, or that with reasonable inquiry would be known, must be used to prevent it.
>
> It may be stated as a general principle of law that one who has in his possession or under his control an instrumentality exceptionally dangerous in character is bound to take exceptional precautions to prevent an injury being done thereby.... While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say, in general terms, that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken.

Scott, supra, 35 P.2d at 752. This, when coupled with the conflicting cases cited elsewhere in Scott, makes it difficult to pin down just exactly what standard was enunciated by the Washington court in Scott. 35 P.2d at 752-53, citing e.g., McLaughlin v. Louisville Electric Light Co., 100 Ky. 173, 37 S.W. 851, 34 L.R.A. 812 (utmost care standard, expense or inconvenience no excuse) and Fitzgerald v. Edison Electric Illuminating Co., 200 Pa.' 540, 50 A. 161, 86 Am.St.Rep. 732 (correct standard applied was highest degree of care practicable). Thus, Scott may be interpreted to favor either of the parties to this appeal.

The Washington courts, however, in Vannoy and its progeny, have chosen not to qualify the standard of care imposed on a utility by the words practical or practicable. While it is true that they

have not expressly revoked the "compatible with practical operation" language from the standard enunciated in Scott, no cases since 1949 have included those terms in the standard of care imposed on a public utility. It would be unreasonable to infer that these later courts meant to include those words, especially since they are incompatible with the highest degree of care human prudence is equal to.

The trial court's findings of fact reflect that the court made a cost-benefit analysis in arriving at the judgment in this case. The court specifically found that the expense of the precautions appellant asserted should have been taken, i.e., the installment of ground wires, would not be justified in relation to the likelihood that they would have prevented any injury.

The result below might have been different had the trial court imposed the highest duty of care, short of insurer's liability, upon the BPA. See Vannoy, supra, 369 P.2d at 853. Though not absolute or strict liability, (which cannot be imposed on the United States, see Laird v. Nelms, 406 U.S. 797, 802-03, 92 S.Ct. 1899, 1902-03, 32 L.Ed.2d 499 (1972), the proper expense-benefit ratio would be different where practicality is not taken into consideration.

"The highest degree of care compatible with practical operation" does not equate with the "highest degree of care that human prudence is equal to." The latter requires that every means known, or which with reasonable inquiry would have been known, be used to prevent death or serious injury in these circumstances. The former, by the

qualification "compatible with practical operation" allows expense and efficiency to balance more heavily against the risk involved than would be allowed under the other standard. The most prudent man would be less concerned with the practical operation of the utility.

The Washington courts have chosen to impose a higher standard than applied by the trial court. This standard of care may have caused a different result in this case. The judgment of the trial court is reversed and the case remanded for a new trial consistent with this analysis.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KENNETH RICHARDSON, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	)	No. C76-260 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming regularly on for separate trial before the Court on the issue of defendant's liability to plaintiff and the evidence having been adduced and argument of counsel having been considered and good cause appearing therefor, the Court now makes the following

FINDINGS OF FACT

1. At all times material, plaintiff resided in Benton County, Washington, within the Eastern District of Washington.

2. On May 10, 1975, in Benton County, plaintiff, an 18 year old high school

student voluntarily assisting his brother-in-law move sections of aluminum irrigation pipe, was severely injured by an electrical current passing through or about his body. He was aware that Bonneville Power Authority (defendant's agency) high power lines crossed the field where he was working.

3. The high power lines crossing over the field were part of the Bonneville Power Authority's (BPA) "Franklin-Hedges 115 kv line." At all material times, the line was under the management and control of the BPA.

4. The normal quantity of energy transmitted through the Franklin-Hedges line was approximately 35 MW. The line's principal structural components were H-frame wood poles with wood spar cross arms. The energized conductor of electricity was composed of aluminum and steel. The conductor spanned 776 feet between poles and sagged to about 30 feet

above ground at the place where the accident occurred. There was no overhead ground wire for the line.

5. At the time plaintiff was injured by electrical current, he was on the ground between poles 5/6 and 4/7 of the Franklin-Hedges line.

6. Lightning activity occurred in the immediate area at the time of the accident. The Court finds that the accident's cause was a lightning strike which resulted in a short circuit of electrical current from the conductor to the pipe carried by plaintiff and his co-worker. This phenomenon of electricity traveling through midair from the conductor to ground may be termed a "midpoint flashover".

7. The accident was not caused by contact between the irrigation pipe carried by plaintiff and the energized conductor. The clearance of the conductor above the ground and the adequacy

of warnings about irrigation operations near power lines are therefore irrelevant issues, and no findings need be made concerning these issues.

8. The electric charge from lightning that strikes a conductor normally runs in both directions along the conductor and either dissipates or goes to ground at the point of least resistance. Normally the point of least resistance is a disconnect switch, which the subject line had, or the power structure. When the charge goes to ground, a temporary line outage results.

9. Installation of a ground wire above the energized conductors permits a charge from lightning to travel along the ground wire to the tower and down the tower to the ground without short circuiting the flow of current in the energized conductors. Utilities install ground wires for system reliability, and not to prevent midpoint flashovers. Installation

of a ground wire may or may not prevent a midpoint flashover incident.

10. Because electricity follows the path of least resistance, the probability of a midpoint flashover is extremely remote. At the time of plaintiff's injury the defendant had no knowledge of any incidents of midpoint flashover.

11. The BPA installs ground wires over lines which transmit extra high voltage, such as 345 and 500 kv lines. BPA's policy was not to use ground wires for 115 kv lines in the area where the accident occurred, and the line above plaintiff did not have a ground wire.

12. Requiring installation of ground wires over all power lines would be impractical because of the high cost in comparison to the possible benefits, and thus would burden the practical operation of utilities.

13. The installation of an overhead ground wire is not a safety requirement

in the industry.

14. The plaintiff has failed to establish that his injuries resulted from the defendant's violation of any safety standards or safety requirement.

15. The plaintiff has failed to establish that his injuries resulted from any act or failure to act of defendant which was negligent or wrongful under the appropriate standard of care.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and over the subject matter of this action under 28 U.S.C. §1346(b).

2. The Federal Tort claims Act at 28 U.S.C. §2674 waives sovereign immunity, with certain exceptions, and provides that the United States "shall be liable, . . . in the same manner and to the same extent as a private individual under like circumstarces. . . ."

3. The standard of care imposed upon a private power transmission line owner

or operator is the highest degree of care compatible with practical operation. The conduct which satisfies this requirement depends upon the damages involved, the likelihood of the circumstance creating a danger, and, because transporters of electricity are not insurers, the reasonableness of the actor's conduct under the circumstances.

4. Plaintiff is denied recovery on the ground that he has failed to establish that the damages claimed were caused by the negligent or wrongful act or omission of an employee of the United States under circumstances where the United States, if a private person, would be liable to the plaintiff.

The Clerk shall enter judgment accordingly.

DONE BY THE COURT this 17th day of July, 1979.

S/ MARSHALL A. NEILL
United States District Judge

28 U.S.C. §1291. Final decisions of district court.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§1292(c), (d), 1295].

28 U.S.C. § 1346. United States as Defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of any executive department, or upon any express or implied contract with

the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS §§ 607(g)(1), 609(a)(1)]. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the

United States.

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting with the scope of his private office or employement, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 6226, 6228(a), 7426, 7428, 7429].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [[28 USCS § 2409a] to quiet title to an estate or

interest in real property in which an interest is claimed by the United States.

28 USC § 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 USC § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title [28 USCS § 1346(b) shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax

or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46 [46 USCS §§ 741 et seq.], relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix [50 Appx USCS §§ 1 et seq.].

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresenta-

tion, deceit, or interference with contract rights: Provided, That with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title [28 USCS § 1346(b)] shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary

system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

Supreme Court, U.S.
FILED
FEB 25 1992
OFFICE OF THE CLERK

(2)

No. 91-942

In the Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH RICHARDSON AND NORMAN J. TRAPP,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
WILLIAM G. COLE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the government's failure to object to the court's subject matter jurisdiction early in the litigation waived the objection.

2. Whether the courts below correctly determined that the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), deprived the courts of subject matter jurisdiction over petitioners' suits.

3. Whether the district court correctly applied principles of Washington state law in adjudicating petitioners' claims under the FTCA.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

American Fire & Casualty Co. v. *Finn*, 341 U.S. 6 (1951)	5
Baird v. *United States*, 653 F.2d 437 (10th Cir.), cert. denied, 454 U.S. 1144 (1981)	8
Berkovitz v. *United States*, 486 U.S. 531 (1987)	6, 7, 9
Birnbaum v. *United States*, 588 F.2d 319 (2d Cir. 1978)	7
California v. *LaRue*, 409 U.S. 109 (1972)	5
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984)	11
Carlyle v. *United States*, 674 F.2d 554 (6th Cir. 1982)	7
Coates v. *United States*, 181 F.2d 816 (8th Cir. 1950)	6
Dalehite v. *United States*, 346 U.S. 15 (1953)	6, 7
G.D. Searle & Co. v. *Cohn*, 455 U.S. 404 (1982)	11
Gibson v. *United States*, 457 F.2d 1391 (3d Cir. 1972)	7
Hart v. *United States*, 894 F.2d 1539 (11th Cir. 1990)	8
Hylin v. *United States*, 755 F.2d 551 (7th Cir. 1985)	7, 8
Insurance Corp. of Ireland, Ltd. v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)	5
Jayvee Brand, Inc. v. *United States*, 721 F.2d 385 (D.C. Cir. 1983)	8
Jet Indus. v. *United States*, 77 F.2d 303 (5th Cir. 1985)	7

Cases—Continued: Page

Keegan v. *Grant County Pub. Util. Dist.*, 661 P.2d 146 (Wash. Ct. App. 1983) 3
Kelly v. *United States*, 924 F.2d 355 (1st Cir. 1991) 7
Kennewick Irrigation Dist. v. *United States*, 880 F.2d 1018 (9th Cir. 1989) 10
Konecny v. *United States*, 388 F.2d 59 (8th Cir. 1967) 8
McCormick v. *Sullivant*, 23 U.S. (10 Wheat.) 192 (1825) 9
Piechowicz v. *United States*, 885 F.2d 1207 (4th Cir. 1989) 7
Richardson v. *United States:*
645 F.2d 731 (9th Cir. 1981) 2, 3
841 F.2d 993 (9th Cir. 1981) 3, 4, 11
943 F.2d 1107 (9th Cir. 1991) 4
Roberts v. *United States*, 887 F.2d 899 (9th Cir. 1989) 8
Stewart v. *United States*, 199 F.2d 517 (7th Cir. 1952) 6, 7, 8
Summers v. *United States*, 905 F.2d 1212 (9th Cir. 1990) 10
United States v. *Orleans*, 425 U.S. 807 (1976) 5, 6
United States v. *S.A. Empreso de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) 6, 7, 10
Wisniewski v. *United States*, 353 U.S. 901 (1957) 10
Zigler v. *United States* No. 90-3796 (7th Cir. Jan. 17, 1991) 8

Statutes:

Federal Tort Claims Act:
28 U.S.C. 1346(b) 4, 5
28 U.S.C. 2671 *et seq.* 2
28 U.S.C. 2680(a) 4, 5, 8

Miscellaneous:

E. Chemerinsky, *Federal Jurisdiction* (1989) 5, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-942

KENNETH RICHARDSON AND NORMAN J. TRAPP,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 943 F.2d 1107. The opinion of the district court (Pet. App. A25-A46) and the subsequent order denying petitioners' motion for reconsideration (Pet. App. A16-A24) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1991. The petition for writ of certiorari was filed on November 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. Petitioners Kenneth Richardson and Norman J. Trapp have been litigating this case since they were injured by lightning over sixteen years ago. Their misfortune began on May 10, 1975, when they were moving aluminum irrigation pipes on a farm that Trapp was renting. Suspended thirty feet above them were three power transmission lines owned and operated by the Bonneville Power Administration (BPA). It was undisputed that the accident could have been prevented if the power line had been equipped with an overhead ground system.

2. a. Petitioners filed separate suits under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, alleging that their injuries had been caused by the negligence of the BPA, an agent of the United States. After trial of petitioner Richardson's case, the district court held that, under Washington law, power line operators must use "the highest degree of care compatible with practical operation." Pet. App. A136. The court found that the BPA had met that standard of care because the potential benefits were not warranted by the high cost of installing ground wires over all power lines. Pet. App. A134.

The court of appeals reversed and remanded, holding that the standard of care under state law was higher than that employed by the district court. Washington law, it held, requires power line operators to use "the highest degree of care that human prudence is equal to." *Richardson* v. *United States*, 645 F.2d 731 (9th Cir. 1981) (*Richardson I*). Pet. App. A117.

b. Prior to petitioner Richardson's second trial, his case was consolidated with petitioner Trapp's. Again the issue of liability was tried, this time using

the more exacting standard of care specified by the court of appeals in *Richardson I*. Prior to the filing of an opinion, however, a Washington state appellate court criticized the decision in *Richardson I* and set forth a standard of care that was very similar to that rejected in *Richardson I*. See *Keegan* v. *Grant County Pub. Util. Dist.*, 661 P.2d 146, 149-150 & n.2 (Wash. Ct. App. 1983). Nonetheless, the district court held that it was bound by the law of the case and held the government to the standard of care set forth in *Richardson I*. It found the government liable. Pet. App. A87-A101. In a supplemental opinion, the district court considered and rejected applicability of the discretionary function exception to the case. Pet. App. A85.

The government appealed and the court of appeals again reversed. It held that, in light of the state court's decision in *Keegan*, the original trial of Richardson's case had employed the proper standard of care. *Richardson* v. *United States*, 841 F.2d 993 (9th Cir. 1988) (*Richardson II*) (Pet. App. A71). Rather than require another trial in the consolidated action, the court of appeals (by subsequent order) left to the district court's discretion whether a full trial was necessary. Pet. App. A52-A53.

c. On remand, the district court declined to relitigate factual issues but, in an evidentiary hearing, heard arguments as to (1) whether petitioners' claims were barred by the discretionary function exception, and (2) how to apply the *Richardson II* standard of care to this case. The district court then dismissed the consolidated action, concluding that the BPA's decision not to build an overhead ground system near the site where the accident occurred fell within the discretionary function exception to the

FTCA, 28 U.S.C. 1346(b) and 2680(a). Pet. App. A25-A46. In its order denying reconsideration, the district court also held that, even if the discretionary function exception were not applicable, the government would still not be liable because it had met the standard of care set out in *Richardson II*. Pet. App. A16-A24. The court of appeals affirmed solely on discretionary function exception grounds. *Richardson* v. *United States*, 943 F.2d 1107 (9th Cir. 1991) (*Richardson III*). Pet. App. A15.

ARGUMENT

Petitioners raise three issues. The first is a question of well-settled law. The second is fact-bound. And the third was not addressed by the decision below. None involves a division in circuit authority; none presents questions of overriding national importance; and as to each, the disposition of the court of appeals is unassailably correct. Accordingly, further review in this Court is unwarranted.

1. Petitioners contend that the United States waived its right to seek dismissal of the action for lack of subject matter jurisdiction. The government asserted the absence of subject matter jurisdiction in its pleadings and relied upon this defense in the district court prior to the second and third appeals. It did not, however, rely upon this defense during the first two appeals in the litigation. Pet. 10-18. Petitioners contend that this procedural history should have led the lower courts to hold that the United States was precluded from raising "lack of subject matter jurisdiction under the discretionary function exception to the FTCA." Pet. 28. The court of appeals' contrary decision conforms to this Court's precedents establishing that objections to subject mat-

ter jurisdiction cannot be waived and is consistent with the decisions of all other courts of appeals.

Because subject matter jurisdiction concerns the courts' authority to hear the case and not the rights of the litigants, parties to litigation cannot create subject matter jurisdiction by failing to raise the issue, and the absence of subject matter jurisdiction may be raised by any party or the court at any point in the proceeding. E. Chemerinsky, *Federal Jurisdiction* § 5.1, at 219 (1989). See *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings."); *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951) (principles of estoppel do not apply); *California* v. *LaRue*, 409 U.S. 109, 113 n.3 (1972) (consent of the parties cannot create subject matter jurisdiction). The rule barring waivers of subject matter jurisdiction is fully applicable here, because the courts lack subject matter jurisdiction over cases that fall within the discretionary function exception to the FTCA.

It is axiomatic that federal courts lack subject matter jurisdiction over suits against the government in the absence of an affirmative waiver of sovereign immunity. *United States* v. *Orleans*, 425 U.S. 807, 814 (1976). Although the Federal Tort Claims Act waives the government's immunity to, and grants courts jurisdiction over, a limited class of negligence claims against the government, Section 2680(a) excepts from the waiver of immunity and grant of jurisdiction all cases based upon the government's exercise of a discretionary function. 28 U.S.C. 2680 (a) ("The provisions of this chapter and section 1346(b) of this title shall not apply to * * * any

claim based upon * * * the exercise or performance or the failure to exercise or perform a discretionary function or duty * * *."); *S.A. Empreso de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984) (discretionary function exception exempts a certain class of claims "from the Act's broad waiver of immunity" and "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain government activities from exposure to suit by private individuals."). Accordingly, where a case falls into the discretionary function exception, there is no waiver of sovereign immunity and subject matter jurisdiction is lacking. See *Berkovitz* v. *United States*, 486 U.S. 531, 535 (1988) (review of disposition of "motion to dismiss the suit for lack of subject-matter jurisdiction on the ground that the agency actions fell within the discretionary function exception of the FTCA."); *Orleans*, 425 U.S. at 814 (where the government has not waived its sovereign immunity, the courts lack subject matter jurisdiction). See also *Dalehite* v. *United States*, 346 U.S. 15, 37 n.32 (1953) (citing with approval *Coates* v. *United States*, 181 F.2d 816, 820 (8th Cir. 1950), which held that, where the discretionary function exception applied, "no jurisdiction" existed.).

Petitioners nevertheless seem to argue that the discretionary function exception is not an exception to the FTCA's waiver of immunity and grant of jurisdiction but an affirmative defense to liability that may be waived. See Pet. 28 (referring to discretionary function exception as an "affirmative defense"); Pet. 10-18 (arguing waiver and consent). Petitioners rely almost exclusively on the 1952 decision of the Seventh Circuit in *Stewart* v. *United*

States, 199 F.2d 517, holding that the government had waived its claim that the discretionary function exception barred suit by failing to raise it earlier. Pet. 15-16. The *Stewart* decision, however, predates this Court's decisions in *Dalehite*, *Berkovitz*, and *Varig*, which construe the discretionary function exception as taking a class of cases outside the congressional waiver of sovereign immunity needed to confer subject matter jurisdiction on the courts. Indeed, as the court of appeals below pointed out, no court of appeals follows *Stewart* today—not even the Seventh Circuit. Pet. App. A13-A14. Instead, they universally agree that, where a case falls within the discretionary function exception to the FTCA, subject matter jurisdiction is lacking.[1] Review of this

---

[1] See, *e.g.*, *Kelly* v. *United States*, 924 F.2d 355, 360 (1st Cir. 1991) ("When a claim is covered by the discretionary function exception, it must be dismissed for lack of subject matter jurisdiction."); *Birnbaum* v. *United States*, 588 F.2d 319, 322 (2d Cir. 1978) ("If the claims in suit fall within one of the statutory exceptions [of which the discretionary function exception is one], the district court lacks subject matter jurisdiction."); *Gibson* v. *United States*, 457 F.2d 1391, 1392 n.1 (3d Cir. 1972) ("It seems settled that any objection raised by the defendant which is based upon the exceptions listed in § 2680 goes to the issue of jurisdiction over the subject matter."); *Piechowicz* v. *United States*, 885 F.2d 1207, 1209 n.1 (4th Cir. 1989) ("The district court held, as it should, that the application of § 2680(a) deprived it of subject matter jurisdiction over the claims against the United States."); *Jet Indus.* v. *United States*, 777 F.2d 303, 306 (5th Cir. 1985) ("[T]he discretionary function exception of the FTCA deprives the district court of subject matter jurisdiction."); *Carlyle* v. *United States, Department of the Army*, 674 F.2d 554, 557 (6th Cir. 1982) ("[T]he courts have no jurisdiction over any claim based on the exercise or performance or failure to exercise or perform these discretionary functions."); *Hylin* v.

issue is accordingly unwarranted.[2]

United States, 755 F.2d 551, 554 (7th Cir. 1985) (per curiam) (Because the defendant's enforcement activities "are protected by the discretionary function exception" the case must be dismissed "for lack of subject matter jurisdiction."); *Zigler* v. *United States*, No. 90-3796 (7th Cir. Jan. 17, 1992), slip op. 3 ("Because the statute, 28 U.S.C. § 2680(a), does not waive sovereign immunity with respect to discretionary function claims, the trial court, at least conceptually, lacked subject matter jurisdiction in the event that the government's conduct here involved the exercise of a discretionary function."); *Konecny* v. *United States*, 388 F.2d 59, 62-63 (8th Cir. 1967) (discretionary function exception is a limit on the waiver of sovereign immunity and accordingly limits the court's jurisdiction to hear the suit); *Roberts* v. *United States*, 887 F.2d 899, 900 (9th Cir. 1989) ("[I]f the discretionary function applies, the claims should be dismissed for lack of jurisdiction."); *Baird* v. *United States*, 653 F.2d 437, 440 (10th Cir. 1981) (discretionary function exception of Section 2680(a) "limits the Government's waiver of sovereign immunity. It therefore poses a jurisdictional prerequisite to suit, which the plaintiff must ultimately meet as part of his overall burden to establish subject matter jurisdiction."), cert. denied, 454 U.S. 1144 (1982); *Hart* v. *United States*, 894 F.2d 1539 (11th Cir. 1990) ("[T]he United States' efforts * * * were discretionary functions and * * * the court below had no subject matter jurisdiction to consider a challenge to those functions."). See *Jayvee Brand, Inc.* v. *United States*, 721 F.2d 385, 387-390 (D.C. Cir. 1983) (where FTCA does not grant jurisdiction because an exemption applies, jurisdiction is lacking).

[2] *Stewart* is, in any event, distinguishable. There, the government raised the issue of jurisdiction for the first time after the issue of liability had been resolved in the court of appeals and district court and the mandate had issued. 199 F.2d at 518. Consequently, the government's assertion of lack of subject matter jurisdiction at that juncture was tantamount to a collateral attack on the judgment. Such attacks are rarely permitted. E. Chemerinsky, *supra*, § 5.1, at 219 (While subject matter jurisdiction may be raised at any point in a proceeding, it is not normally "a basis for a collateral attack on a judg-

2. Petitioners next argue that the discretionary function exception to the FTCA does not apply here. Specifically, they contend that the BPA's decision not to equip its power lines with an overhead ground system to divert lightning strikes was not the type of decision Congress meant to insulate from judicial review. But they do not quarrel with the court of appeals' statement of the law, see Pet. 19; they just disagree with its application of the law to the particular facts of this case. Because their contention is both fact-bound and wrong, further review is unwarranted.

The court of appeals properly analyzed this issue using the two-part test announced in *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). See Pet. App. A7-A11. The first step is to "consider whether the action is a matter of choice for the acting employee," 486 U.S. at 536, *i.e.*, whether it is "discretionary." Petitioners do not dispute that the BPA's action here was "a matter of choice," as no statute, regulation or policy prohibited the course the BPA selected. Pet. App. A9; Pet. 20. They only dispute the court of appeals' application of the second prong, under which it was required to decide whether the challenged decision was "based on considerations of public policy." 486 U.S. at 537. Where decisions are based on such considerations, the discretionary function exception deprives the courts of jurisdiction over the suit, as Congress wished to prevent "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political

---

ment; that is, once a judgment is entered it cannot be attacked, except on appeal, on the ground that the court lacked subject matter jurisdiction." (citing *McCormick* v. *Sullivant*, 23 U.S. (10 Wheat.) 192 (1825))).

policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814.

Petitioners claim that the BPA's decision not to install overhead ground wires failed this second prong because it did not involve "considerations of public policy." They argue that the Ninth Circuit should have followed its own decision in *Summers* v. *United States*, 905 F.2d 1212 (1990), in which the panel found the exception inapplicable, rather than its decision in *Kennewick Irrigation Dist.* v. *United States*, 880 F.2d 1018, 1021 (1989), upon which the decision below relied. Pet. 18-20. The question of whether one Ninth Circuit decision or another controls a case is, of course, a matter of concern to the Ninth Circuit; but it does not merit this Court's attention. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, the decision below was correct. *Summers* involved the Park Service's failure to provide warning signs about the dangers of stepping on hot coals in fire circles on federal beaches. The court held that this failure was not the result of "choices among political, economic, and social factors" but was rather "a departure from the safety considerations established in [Park] Service policies." 905 F.2d at 1216. It therefore held that the decision was not covered by the discretionary function exception to the FTCA. *Ibid.* Here, in contrast, the decision of where to install overhead ground wires was not a departure from established considerations but "a design decision based on technical, economic, and social considerations," Pet. App. A11, including the likelihood of lightning strikes, the importance of the equipment to be protected, and the cost of installing the overhead ground wires on all similar areas. Pet.

App. A10 & n.4. Because the decision was based on policy considerations, including the economic costs and social benefits of adding overhead ground lines, the court of appeals' conclusion that the discretionary function exception applied was correct.

3. Finally, petitioners object to the trial court's application of the standard of care as interpreted in *Richardson II*. Pet. 20-28. However, because the court of appeals below did not reach this state law question and instead affirmed dismissal on jurisdictional grounds, Pet. App. A15, it is not an appropriate basis for further review. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
WILLIAM G. COLE
Attorneys

FEBRUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45335